RECENT THEORIES OF SOVEREIGNTY

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RECENT THEORIES OF SOVEREIGNTY

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To my parents
Ephraim Jacob and Deborah Sarah Cohen

PREFACE

This study owes its existence to a suggestion by Professor Charles E. Merriam that the author investigate the course of sovereignty since the turn of the century. The study has had the benefits of scrutiny and criticism at the hands of Professor Merriam and members of his graduate Seminar in Politics and Citizenship over a period of years. It has been read and commented on by Professor Quincy Wright, by whom the author was first introduced, as a student, to the field of international law.

To both these men the author wishes to express his deepest gratitude for their direct and immediate influence on the study in its formative stages.

The author feels this the place to record, too, his deep sense of obligation to those who fashioned his approach and gave him his first appreciation of philosophy, Professors Addison Webster Moore, Arthur Edward Murphy, George Herbert Mead, and C. Delisle Burns; of sociology, Professors Ellsworth Faris and Edward Sapir; and of history, Professor Carl Huth.

To Professors Rodney Mott and Kenneth Sears I owe my introduction to the study of public law and to Professors Harold Foote Gosnell and Harold D. Lasswell, my introduction to the study of politics and public opinion. To Professor Leonard D. White I owe my introduction to the principles of public administration.

In the course of my studies in Europe as a fellow of the Social Science Research Council of New York, I had the opportunity of confirming some of the analyses and expositions in this study, for which I am exceedingly grateful.

The personal kindness of Professor Hans Kelsen and his family while I was at Geneva (Switzerland) are graven deep

in my memory. The pleasure of my contacts with Professor A. D. Lindsay, Master of Balliol, Oxford; Professor C. Bouglé, Director of the Ecole Normale Superieure, Paris; with Doctor Herman Finer and Professor Harold J. Laski, of the London School of Economics; with Professors William Rappard, Ludwig von Mises, and the other members of the faculty at the Institute Universitaire des Etudes Hautes Internationale remains vivid in my memory.

Hymen Ezra Cohen
June 12, 1937

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CHAPTER I

INTRODUCTION

THEORIES of sovereignty are theories of politics. They are expressions of political patterns of behavior. In the so-called first "modern" theory of sovereignty, in the *De republica* of Jean Bodin, the pattern of domination reflects co-ordinated, unified, supreme power controlled by a definite person or group of persons. The supreme power, the sovereignty, is considered as best situated in a single individual at the head of the state—in the monarch. Co-ordinated, unified, supreme power appears again in a competing pattern, its nature essentially unchanged, but its situs definitely established, not in the monarch, but in the people. What distinguishes the two patterns is the insistence of the latter upon the fact that the source and residence of sovereignty are possible only in the people.

A unified, co-ordinated, supreme power prevailed as the essence of the sovereignty pattern so long as there was essential agreement concerning the necessity for unitary control of all power and so long as the conflict was only as to who should exercise that control. When, however, the problem became one of the extent and nature of the power exercised, then the sovereignty pattern underwent another mutation. In the international field with its contending autonomous groups, with its newly emergent states, the claims to exclusive possession of absolute, unitary power were hardly reconcilable with the desire and the need for peace. To further peace and co-operation among the rulers and nations which had arisen from the remains of the economically antiquated feudal system, the concept of sovereignty changed from a single unitary supreme

power. It became a sum of powers, an assembly of rights and privileges, analogous in nature to a property right which was divisible and alienable, capable of fragmentation, acquisition, and cessation. In this manner, owing to the exigencies of an international situation in which the possession of sovereignty was the index to internal governmental supremacy, sovereignty externally was limited in meaning to the recognition that the government was supreme domestically and that it could enforce what it would on its own domain. Externally, it claimed no supremacy; it claimed only a freedom from external control—independence. It claimed, in other words, the right to make such obligations for itself and its nation as it pleased, of its own free will.

One other clear-cut pattern of sovereignty appeared in addition to those already mentioned. Sovereignty hitherto had appeared as a mundane force physically existent in the ruler or the people, or in combinations of the two. During periods of strife, however, when it became difficult to determine an actual situs for a single power, or when the forces were so evenly balanced or so scattered and minute that a single force was indiscernible, doubt arose as to whether sovereignty was a mundane force at all. Then sovereignty was recognized as an attribute of God, or of Reason, Justice, Law, or some equally supramundane entity, with the tacit assumption that, if it existed at all, it existed elsewhere but not on earth. In this wise, for example, the Reaction, after the French Revolution, met the ideological assault of Rousseau's theory.

When the need for discrediting the theory of national sovereignty disappeared—with the emergence, for instance, of stable republican government in France and elsewhere—the very symbols which had served to oppose the doctrine of supreme power were converted into pillars of support. Liaisons were made with the superterrestrial. God yields the exercise of his sovereignty to the government of his choice. Reason

finds its residence in the nation. Justice and law are social; reflected in the organs of the state. Even history, which had participated in the attack on the national sovereignty of Rousseau, which had been invoked to deny the historicity of the social contract and the antecedent state of nature, bolsters up the concept of national sovereignty by confirming the existence of ultimate popular control in occidental governments. This reacceptance of sovereignty, however, does not create a new pattern. It simply restores an old one—unified power in the nation or in the state.

Theories of sovereignty are theories of politics, theories of power. Sovereignty resides in one. Sovereignty resides in the many. Sovereignty is fragmentary. Sovereignty is supramundane. These are the patterns of the concept as it appears in history.[1] And these are the patterns which appear on the threshold of the most recent period of political history. What happens to them as they course through the last decades of the nineteenth century and into the twentieth?

The last quarter of the nineteenth century and the first quarter of the twentieth have seen the continuance and the transformation of the forces of the past. The need for unity in government, the need for peace and co-operation in international relations, have been accelerated by the advances in culture and civilization. Simultaneously, the growth of geographic federalism and economic and social pluralism has been quickened by the expanding effects of the Industrial Revolution. Economic and social forces have had their repercussions in the political. Governmental structures and functions found themselves responsive to their sustaining bases. Governmental theory, too, rendered obeisance to political demands.

Not the political alone, however, influences theory. Social

[1] For a full treatment see Charles E. Merriam, *History of the Theory of Sovereignty since Rousseau* (New York: Columbia University Press, 1900).

facts and political institutions are an important element, a very important element, in shaping the general patterns of an ideology. But not the sole factors. They furnish the basic groundwork, perhaps. The techniques of elaborations, the nature of the justification, and the types of interpretation will depend as well, however, upon the philosophy, the outlook, the intellectual background—in short, on the general culture of the theorizer.

The study of sovereignty, then, in the very immediate past, is not only a study of the vicissitudes of sovereignty in the midst of sharpened social and economic facts, but of sovereignty in the midst of new intellectual outlooks, philosophies, and formal sciences. Positivism, Neo-Kantianism, pragmatism—to mention but a few—appear as intellectual forces significant in changing the basic supports of the theory of sovereignty. Jurisprudence and political science, historically the intellectual origins of sovereignty, also undergo changes which affect the concept. Our problem, succinctly stated, is, How? How is sovereignty affected as it adapts itself to the twentieth century? And the purpose of our study is to discover and understand that adaptation.

Our concern is primarily with the modern formulations and their present significance. It is with the broad outlines of a general picture rather than with the minute details thereof. The most that can be hoped for is that the composite picture will comprehend all the current significant details, irrespective of the source or author of any single detail. So, for example, we shall view the theory of national sovereignty in the elaboration of Adéhar Esmein, its famous French exponent, although we find parallels to the theory in other continental countries, in France, and in England. We shall view the theory of state sovereignty, of auto-limitation, in Georg Jellinek, its greatest exponent and perhaps the greatest jurist

of the federated German Empire. In "Sociological Jurisprudence" the major assumptions and implications of Jellinek's analytical jurisprudence are denied in view of a growing internal federalism, of a social pluralism, and of a changing concept of the state. The writings of Léon Duguit, first formulator and expounder of Sociological Jurisprudence during three decades of the twentieth century, will illustrate the influence of syndicalism and "public services" on juristic thought colored by positivism. Another jurisprudence, too, arose in reaction to the method and results of Jellinek's *Allgemeine Staatslehre*. Hans Kelsen, a pupil of Jellinek's reacted against the dominant jurisprudence, but proceeded in a totally different manner and by a totally different method to arrive at results similar to Duguit's. As the famous founder of the Viennese school of law and as a ranking modern Neo-Kantian jurist, Kelsen's final formulation may be taken as illustrative of the force of internationalism in jurisprudence.

Kelsen's system led him to consider the laws of international as well as of intrastate relations as part of the same legal system. For the meaning of sovereignty this has significant results, as we shall see in our later discussion. But, concurrently with his theory, and even before it, there arose legal systems which recognized a very sharp division between international and intrastate (or municipal) law. The dualism in law between international and municipal law antedates the twentieth century. It is defended by Triepel in Germany, Anzilloti in Italy, Willoughby in America. Significant recent elaborations in the dualistic theory, however, so far as they concern the concept of sovereignty, are to be found in Quincy Wright's *Mandates under the League of Nations*. After indicating the status of the theory among the international lawyers, and in the British Commonwealth of Nations, we shall view it in the elaboration of an outstanding political scientist,

Harold J. Laski, who is fairly typical of the political pluralism which is become increasingly significant during the twentieth century and of the nonjuristic thinking concerning the state.

In the selection of the theories to be presented, as well as in the omissions, there is undoubtedly something of the arbitrary. On the whole, however, the minute composite picture is planned to illustrate the course and experiences of the theory of sovereignty in the twentieth century and indicates the general nature of its manifold vicissitudes.

CHAPTER II

NATIONAL SOVEREIGNTY—ESMEIN

SOVEREIGNTY resides in the nation; it cannot reside elsewhere. This is the basic assumption of national sovereignty. In the eighteenth century this doctrine found its expression and justification in the arguments of Jean Jacques Rousseau.[1] Social contract was the basis of a sovereignty which evolved among individuals in a state of nature. An agreement between free individuals resulted in the union of all for the benefit of all. It stipulated that each would yield so much of his rights as was necessary for the welfare of all. It intended that the will of each be submerged in the general will, yet remain free as before, absolute, unlimited, indivisible, and inalienable.

The subsequent course of historical and sociological development made it difficult for the successors of the Revolution to accept the formulation of Rousseau. There is no evidence that a contract was ever entered into. There is no evidence that a state of nature ever existed. One might argue that the agreement is tacit, implied by continued residence within the territory subject to the sovereignty. But such an assumption is obviously an assumption of the fictitious. Both history and sociology indicate that the formation of a nation is by no means the result of direct, voluntary activity on the part of individuals who form a contract. On the contrary, the nation is considered, since Sir Henry Maine and Savigny, as a product of long historical evolution. Even in jurisprudence it may be taken for granted as a social fact,[2] but not as a consciously created one.

[1] *The Social Contract* (New York: G. P. Putnam's Sons, 1906).

[2] "The formation of a nation is a successive phenomenon, the product of a very long natural evolution, whose laws sociology and history must deter-

In addition to this objection, there is one other which makes the doctrine of Rousseau difficult to accept. The final subordinate position of the individual despite the original independence he supposedly possesses is inescapable. For the theory culminates in the alienation of individual rights in the interests of the community; in the subjection of the individual will to the general will encompassing it.[3] Such status for the individual, is not in accord with the modern concept of free men. Hence, on this point too, the old theory is objectionable.

If the preceding reasoning indicates that the fiction of a social contract must be discarded, the problem remains to determine upon what other basis national sovereignty can be founded. Adéhar Esmein, the famous French jurist, suggests new bases for the old doctrine. The first is an idea of "common sense, long current." It follows the line of reasoning which runs from the purpose of government to its structure: Public power and government exist only in the interest of all the members who compose the nation. From which one may readily conclude that what is established in the interests of all ought to be ruled by those interested, by the general will, by all the citizens participating in its establishment, subject only to the rule of the majority.[4] This line of reasoning, argues Esmein, is not only cogent in itself but is venerable

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mine, and where the conscious wills of successive generations and still more the formal connections between men, have a very small place. The existence of civilized and distinct nations is a social fact which must be purely and simply accepted when one seeks in law where sovereignty resides in a nation. Constitutional law and sociology are absolutely different domains" (Adéhar Esmein, *Eléments de droit constitutionnel* [6th ed.; Paris: Recueil Sirey, 1914], p. 280).

[3] "The fiction of social contract thus presents two inconveniences. In the first place, though beginning with the individual rights, it sacrifices them in defining them, since it concludes with the alienation of the individual and his rights to the profit of the community. Secondly, it makes his rights rest on a primary and absolute independence, resulting from a state of nature" (*ibid.*, p. 279).

[4] *Ibid.*, p. 280.

in its antiquity. The ancient republics practiced it instinctively; the Roman Empire admitted it in its very origins; St. Thomas Aquinas saw it as an excellent idea. The theory of the Reformation in France, of the Puritan revolution in England, of the Monarchomachs—all followed the same logic that sovereignty inhered in the people and could not be alienated.

Bodin's doctrine, which tended toward monarchical absolutism, had militated against this idea in that it considered sovereignty transferable to the monarch. To attribute the right of the monarch to divine law is, however, to go beyond the sphere of the scientifically demonstrable; for the only recorded instance of divine transference of power is in the story of Saul's assumption of kingship in Israel. The attempt to argue monarchical right from long possession is an argument from historical facts, proving title in the face of contrary reason; for man, being "a product of liberty, not fatality," can dispose of his own destiny but never of the destinies of the men who succeed him. He cannot obligate or engage future generations. To think otherwise would be to facilitate traditional immobilization and, eventually, to negate individual rights.[5]

Sovereignty inalienable in the nation, therefore, is fundamentally based on reason[6] and on the rights of individuals. It finds additional support in the fact that it is the only exact and adequate juridical interpretation of an incontestable and controlling social fact—the fact of an organized nation under government. Government, the *de facto* exercise of sovereignty, exists only if popular obedience is achieved, only if the citizens obey. Obedience is achievable through either violent coercion or acquiescent public opinion. The only reason-

[5] *Ibid.*, pp. 281 ff., 285.

[6] Sovereignty based on reason is in accord with the theory of Lerminier and Sismondi; cf. Charles E. Merriam, *History of the Theory of Sovereignty since Rousseau* (New York: Columbia University Press, 1900), p. 83.

able method is the latter. The former is a hateful dream. Public opinion is the essential element in securing obedience to the sovereign, to the nation legally organized. This means that the problem of a national sovereignty is to establish rapport between the legal sovereign, which is the government, and the practical sovereignty, which is the public opinion of the nation.[7] It means that opinion must be given a means of expressing itself freely through press and assembly.

Now, then, this concept of sovereignty inherent in the nation has very definite consequences. From it follow significant deductions as to the form of the state; as to political suffrage; as to the idea of representative government; and as to the nature of the responsibilities of public functionaries or civil servants.

Concerning the form of the state, if we begin with the basic assumption of the *Déclaration des droits de l'homme et du citoyen* that "the principle of all sovereignty resides essentially in the nation; nobody, no individual, can exercise any authority which does not emanate expressly from it" (Art. 3), but one result follows. Only the democratic republic is compatible with it. For here alone are all the powers conferred directly or indirectly by the body of the nation. Here and only here are these powers conferred for a limited time, and the control of government must be renewed formally and periodically. Only thus can national sovereignty maintain a continuous activity and manifest itself periodically. Under absolute monarchy, however, or even under constitutional monarchy, this is impossible. For the source of government in the one case, or the possibility of control in the other, are not subject to the nation. Rousseau's concept had admitted the possibility of a monarchical executive along with national

[7] Esmein, *op. cit.*, pp. 286–88. He follows David C. Ritchie, whose article "On the Conception of Sovereignty," in the *Annals of the American Academy of Political and Social Science*, 1891, he cites in a footnote, p. 287.

sovereignty because it considered sovereignty as the legislative function alone. Sovereignty was lawmaking, the expressing of will. The modern concept, however, conceives the executive function as also a manifestation of sovereignty. Both legislation and execution are its attributes. And, therefore, sovereignty is incompatible with either any hereditary executive or hereditary legislators. The English House of Lords, the lifetime French senators, are consequently inconsistent with the modern theory.[8] A federal form of government, on the other hand, such as obtains in the United States, is not incompatible with the doctrine of national sovereignty, since there is no alienation of national sovereignty. Those who participate in controlling the particular states participate in the control of the larger state. It comes as the result of a veritable social contract through which the control, however, remains in the people.

The institution of political suffrage grows from the very nature of the nation. Since the nation is not a real person, but a collectivity of individuals, its will is not a real will but the concurring will of individuals within the collectivity. These taken together form the will of the nation. Those who may participate in determining the general will possess the right of political suffrage and constitute the legal nation. Ideally, the will of the nation should be the unanimous will of all the possessors of political suffrage. Practically, unanimity in a large society appears impossible. At best, one must determine the will of the majority and assume that it is the will of the nation, the general will. This assumption, however, is not the result of a contractual arrangement, as the social-contract theory had it; it is based upon the fact that it is "simple idea," generally accepted as being natural, necessary, and pacifying.[9] The only other possible way of resolving con-

[8] *Ibid.*, pp. 297 ff.
[9] *Ibid.*, p. 300.

troversy as to the general will would be to accept as decisive the opinion of the sages. But this would immediately lead to the problem of who are the sages? Simple majority rule, on the other hand, shows no favoritisms and weights each man as equal.

The determination of the general will through suffrage, if we follow the principle of national sovereignty, implies a definite form of organization for voting. It requires the single-member district based upon population and the selection of its representative, not for itself, but for the nation as a whole. It excludes completely any minority representation, or representation of interests. Sovereignty inheres in the nation, in the group as a whole. Whoever is elected is elected to represent all. To send special representatives for definite minorities or interests is to violate the principle, is to permit the representation of something besides the sovereign nation. Proportional representation, this theory holds, menaces the very principle of authority. It leads to anarchy.[10] Only territorial representation is compatible with the principle of national sovereignty.

This same principle is decisive in indicating who has the right to exercise political suffrage. The argument that political suffrage is an inherent human right and that therefore political suffrage belongs aright to every citizen is not tenable. For it would lead to the possibility of alienating sovereignty if and when all the humans were willing to yield this right, inherent in themselves; whereas we know that sovereignty is *inalienably* situated in the people. It would render difficult the demand for submission by the minority, whose sovereignty, also being inherent, is as potent as that of any majority. It would lead to woman suffrage; to no age limits for voting; to no residence requirement; to no possible temporary

[10] *Ibid.*, p. 328.

suspensions of voting by those, e.g., in the army or navy; and to voting by prisoners and inmates of public institutions for the poor, etc.

Actually, however, in accordance with the modern doctrine of national sovereignty, voting is not a right; it is a social function. It is subject to the needs and requirements of society and may be limited or extended or safeguarded as necessary.[11] The state may therefore refuse the vote to women, whose sphere is the home and within the family; it may impose age limits, residence requirements, educational achievements. It may even weight the votes through plural voting. Logically, the theory of national sovereignty permits all these. And, if we view the course of legislation in modern democratic countries, we shall find further proof.[12]

As to representative government, it too is essentially bound up with the concept of national sovereignty. Representative government means that those chosen to represent the people have the right, within the limits of the attributes conferred upon them, to decide freely what they think is the will of the people. The idea that direct legislation on the part of the people is more in accord with national sovereignty is inaccurate. It was possible in small states where all the citizens gathered to legislate; but in modern times the citizens, although able to choose adequate representatives to express their wills, are in no position to decide on individual laws because of the intricacies and complexities involved. Nor is decision by vote a correct way of expressing opinion on complicated measures where one may be in substantial accord with the main principle and in disagreement with various details. Then, because of the necessity for a "yea" or "nay" vote, one's real will fails to get full expression; for then either the detail or

[11] *Ibid.*, p. 356.
[12] *Ibid.*, p. 391.

the principle must be sacrificed. On the other hand, the representative system permits the expression of general policy by the national sovereignty and its fulfilment by the representatives who can deliberate and study and discuss before passing legislation. The institutionalized guaranties of modern democratic government are sufficient to assure that they do not violate their trust and that they achieve the realization of the national will.[13]

"National sovereignty has a definite stand, also, in regard to the responsibility of civil servants. So far as the representatives are concerned, they are permitted freedom from responsibility in order to permit freer discussion and action in determining the general will and in its achievement.[14] Civil servants, however, are and have been held responsible under the doctrine of national sovereignty, in case of excess of power or of misuse of power. In these cases they are held individually liable.

As for the civil servant's position within the service, of course the theory of national sovereignty considers him as without rights against the state. He is its agent and bound to fulfil its commands docilely and obediently.[15] For its commands are the commands of the nation.

Formally stated, to summarize the theory concisely, we

[13] *Ibid.*, pp. 393 ff.

[14] *Ibid.*, p. 437.

[15] "In every department of service the functionaries form a regular hierarchy of which the chief is the President of the Republic and in which the inferior always owes his immediate superior obedience when the latter gives or transmits an order which is not contrary to law. This order which is given in the name of the state is constitutionally the very voice of the national sovereignty. The functionaire accomplishes his service under conditions determined for him by rules and regulations, with the treatment attributed him by law, and stays attached there until released: He has no other rights to assert against the state for, as we have said, the function exists in the public interest which represents the state and not in the interest of the functionaire. Functionaires are the instruments of government, endowed with intelligence and will, but necessarily docile" (*ibid.*, pp. 697 ff.).

find that "the state is the juridical personification of the nation."

That which constitutes a nation in law is the existence in a society of men of an authority superior to individual wills which recognizes no force superior or concurrent in the sphere where it acts. This superior authority is called *sovereignty*. It has two aspects, *internal* sovereignty, or the right to command all the citizens composing the nation, or even all who reside on the national territory; and *external* sovereignty, or the right to represent the nation and obligate it in its relations with other nations.[16]

Since the state is the nation, juridically comprehended, its authority, its sovereignty, ought to be exercised only in the interests of the entire nation.[17] And, since the state is the nation, its life is as continuous as that of the nation. Governments, means of exercising sovereignty, may change, but the state maintains itself irrespective of any changes, be they due to revolutions or elections.

So for Esmein, the state is the nation personified; sovereignty is the public authority which resides in the nation and which expresses itself in both legislation and administration; government is sovereignty actually set at work.[18] And law, to quote verbatim, is: "An imperative or prohibitive rule set by the sovereign, which concerns, not a particular interest, but a common interest, not regarding an isolated individual, but regarding all, for the future and forever."[19] There are laws

[16] *Ibid.*, p. 1.

[17] "The public authority, sovereignty, ought never to be exercised but in the interests of all: that is what is intended by giving it a fictitious personality as subject, distinct from all the individuals who compose the nation, distinct from the magistrates and the chiefs as well as of the simple citizens" (*ibid.*, p. 2).

[18] *Ibid.*, p. 20.

[19] "Elle peut en effet être définie: Une règle impérative ou prohibitive posée par le souverain, qui statue non dans un intérêt particulier, mais dans l'intérêt commun, mon à l'égard d'un individu isolé, mais à l'égard de tous, pour l'avenir et à toujours" (*ibid.*, p. 20).

passed by the legislature which are limited to a certain time period, but these are not law although they are in legal form. They are basically administrative acts passed by the power which exercises the legislative power, because, normally, laws must be considered as a general and just rule of law. To restrict it to a definite time period is impossible. Of course, in times of great emergency the legislature may pass an act which it recognizes as contrary to normal justice. Here, the temporal limitation in the body of the law is simply a recognition of true legality and a provision for the certain return of that legality in the future. In general, however, law is a permanent rule for the general interest.

Indeed, this restriction of the law to general interests is an essential guaranty of individual liberty. There can be no true liberty if the general assembly can act against an individual. This limitation to general acts is a limit to state action, and, if you will, to state sovereignty. For, essentially, the important thing is the individual and his rights. These furnish the basic limitation upon authority. They rise as anterior and superior to the state, whose purpose really is the fostering and assurance of rights to the individual.[20]

The formulation of the theory of national sovereignty summarized above is written into the modern jurisprudence of France as an accepted interpretation of the nature of political facts in those countries which sought "modern liberty." It dominated French jurisprudence in the early part of this century, to be seriously challenged only by the objective law of Duguit.[21] We can find its reflection in the philosophy of

[20] "But, on the contrary, one of the best established and most fecund ideas of modern times is that the individual has rights anterior and superior to those of the state which consequently impose themselves on the respect of the state. . . . In effect, it determines, more directly than any other law, the exercise of sovereignty, for it prevents the sovereign from making laws which infringe upon individual rights and commands him to promulgate those which assure efficaciously the enjoyment of these rights" (*ibid.*, p. 30).

[21] Cf. chap. IV on Duguit.

France's elder statesmen[22] and jurists[23] and in the newer[24] nationalistic states of Europe. The Esmeinian elaboration is chosen as fairly typical of the doctrine of national sovereignty. It reveals the combination of historian and jurist,[25] of nineteenth-century individualism, rationalism, and democracy. It indicates the great faith in representative government and its older institutions. Much of its political philosophy is that of Jean Jacques Rousseau and Montesquieu. The ideas of national sovereignty and social contract which Rousseau popularized for the French Revolution, and the idea of the separation of powers and the threefold division of functions into executive, legislative, and judicial, which Montesquieu saw in English institutions, are integral to Esmein's theory.

The justifications, however, which Esmein gave for retaining the concepts which he adopted from his political forebears indicate that his own general philosophic outlook broadened under the influence of increasing social knowledge. They reveal the skepticism which made it impossible for him to assume any historical validity for the social contract or a state of nature, as Rousseau saw it. This did not, however, lead to a denial of the deductions which resulted from Rousseau's attitude. It simply led to a shifting of the bases of justification. It reveals, therefore, the extent to which Esmein was in rapport with the still dominant philosophy of his day.

[22] Cf. the chapter on "National Sovereignty" in Raymond Poincaré, *How France Is Governed* (New York: 1914).

[23] Cf. Gaston Gavet, "Individualism and Realism" (trans. E. M. Borchard), *Yale Law Review*, XXIX, 523 ff.

[24] Cf. Malbone W. Graham, *New Governments of Central Europe* (New York: Henry Holt & Co., 1926).

[25] In England one might find his parallel in such authors as Dicey and Ritchie; cf. A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (New York: Macmillan Co., 1915), and our discussion, chap. vi, below. Esmein cites both these authors and a multitude of others. He emphasizes the debt democratic government owes to England and lists a Bibliography of significant English writers, lawyers, and historians of whom he was cognizant.

Where more scientific history failed to substantiate Rousseau, Esmein found justification in logic, in reason. In addition to reason, however, Esmein seeks historical proof for the inductions from abstract principles. His entire method is one of testing his logic by the historical facts which he can marshal. Therefore he surveys practices and reasons logically. He investigates the legislation pertinent to the various facts of legislation or constitutional history in the countries of modern liberty and finds substantiation where he seeks it.[26]

One must note, however, the very obvious fact that Esmein has invoked history to prove his points rather than to achieve them. He has excluded from his survey any reference to the history of ancient democracy which is in "a different world"; his concern is only with modern history. Even in the sphere of modern history, Esmein has limited his horizon to the countries "of modern liberty." He has, therefore, consciously excluded the German Empire. And thus his generalizations, induced a priori, are substantiated within a field of historical reference which consciously excludes contradictory materials.

The significance of this as a means—whether consciously adopted or not is beyond the point—of defending and conserving existing institutions as they are is patent. It is definitely a defense against social or political facts which might be difficult to rationalize into an already satisfactory system. It aids Esmein in projecting and defending the legal system whose most outstanding jurist he was for at least a decade.

[26] Esmein, *op. cit.*, p. 391.

CHAPTER III

SOVEREIGNTY AS AUTO-LIMITATION—JELLINEK

IN THE jurisprudence and political science of the late nineteenth and early twentieth centuries Georg Jellinek is an outstanding figure. Professor at Heidelberg from 1891 until his death in 1911, Jellinek presented a formulation of the nature of the state, its power, and its sovereignty which won many adherents and disciples, not only in Germany, where his *Allgemeine Staatslehre* was a classic in political theory, but also in foreign countries where his work circulated both in the original and in translation.[1] As to the nature of the state, Jellinek's jurisprudence is a development of the theory of *Herrschaft*, of domination, promulgated first by von Gerber[2] and followed by Laband[3] and Preuss.[4] As to the theory of sovereignty, his formulation is a modification of the *Kompetenz-Kompetenz* theory advanced by Georg Meyer[5] and Albert Haenel.[6] His elaboration of the nature of the political definitely influenced such constitutional authorities as Carré

[1] Cf. Hermann Heller's article on Georg Jellinek, *Encyclopedia of the Social Sciences*, Vol. VII (New York: Macmillan Co., 1932). A French edition of his *Allgemeine Staatslehre* came out as recently as 1921.

[2] Carl von Gerber, *Grundzüge eines Systems des deutschen Staatsrecht* (Leipzig: B. Tauchnitz, 1865). It is Carré de Malberg who gives Gerber credit for beginning the theory; cf. his *Contribution à la théorie générale de l'état* (Paris: 1920), p. 151.

[3] Paul Laband, *Le Droit public de l'Empire Allemand* (Paris: Giard & Brière, 1900), trans. C. Gandihlon from *Das Staatsrecht des deutschen Reich* (1876–82).

[4] Hugo Preuss, *Gemeinde, Staat, und Reich als Gebietskörperschaften* (Berlin: J. Springer, 1889).

[5] *Grundzüge des norddeutschen Bundesrechts* (Leipzig: Serigsche Buchhandlung, 1868).

[6] *Studien zum deutschen Staatsrechte* (Leipzig: 1873).

de Malberg[7] in France, and W. W. Willoughby[8] in the United States.

Jellinek's political formulations and those of Esmein are basically similar. Constitutionalism pervades them both, as do an emphasis on the individual and his rights and a recognition of the historical. They are similar, too, in their distinction between the nation and the state. In Jellinek,[9] however, a marked, conscious, division of juristic theory from general positivistic philosophy is emphasized. The state can be viewed, according to him, as a sociological entity, or, even better, as a socio-physical entity, consisting of people, territory, and government, or as a juristic personality, a corporation.

As a sociological, physical, human entity, the state has one aspect and one series of problems. Here a study of its nature resolves itself into a study of sociology, psychology, anthropology, ethnography, ethnology, folk psychology, and such kindred sciences. In short, here a study of the state is not juristic but more nearly what we now call "political"; it is political science. In this aspect of the study of the state, Jellinek allies himself with the newer currents of thought of his day. In his emphasis on this aspect he differs from Esmein. He revolts from a methodology which would reason a priori and thereafter proceed to find confirmation for what it has already determined to be rationally true. He prefers a methodology which investigates details first; he indicates his familiarity with Georg Simmel's approach to methods of historical research, with Stammler's *Wirtschaft und Recht,* with G. von Mayr, *Theoretische Statistik* (1895).[10] He recognizes the weakness of analogous reasoning in the social sciences where history never repeats itself and individuals are the never re-

[7] *Op. cit.*

[8] *Fundamental Concepts of Public Law* (New York: Macmillan Co., 1924).

[9] Georg Jellinek, *Recht des Modernen Staates: Allgemeine Staatslehre* (Berlin: O. Häring [J. Springer], 1900).

[10] *Ibid.*, pp. 23–24.

curring elements that furnish the subject matter of study. On the other hand, he recognizes that there is sufficient analogy to permit the recognition of types of individuals and of states. He notes the dynamic nature of the state, which is constantly changing and reconstructing itself. "Every new technical invention has incalculable consequences, every advance in the economic production . . . on the folk economy. . . ."[11] The concomitant effects of the changes in social institutions cannot be forecast. Similarly, the concomitant effects and consequences of laws, their mutations, and their enforcement are also of the utmost social value but unpredictable.

Jellinek recognizes that the manifold relationships of the state as an entity consisting of people and of territory are the subject matter, not only of the social-psychic sciences, but of the natural sciences as well. He believes, however, that to conceive the state "in its universal aspects" is hardly possible. "So the sciences isolate aspects of it and deal with them. Each science is an independent one and uses independent methods."[12]

Much of the significance of this sharp division of the science into juristic and political lies in the fact that such a specialization blunted the edge of pressing social facts which otherwise might have cut away the legal fictions and personifications which persisted in the jurisprudence. It was perfectly satisfying intellectually to retain as conscious fictions in jurisprudence those concepts which had been qualified and revised in the non-juristic section of the general study. Thus, e.g., although Jellinek admits that the state is a social apparition (*Gesellschaftserscheinung*),[13] composed of other small societies of various types, in law it is a single unity.[14]

Similarly, although Jellinek recognized the influence of the

[11] *Ibid.*, p. 46.
[12] *Ibid.*, p. 67.
[13] *Ibid.*, p. 74.
[14] He quotes Rousseau's *Discours sur l'économie politique:* "Every state society is composed of other small societies of differing degrees, each of which has its interests and values . . . ." (*ibid.*, p. 78).

state on society as a whole and of society on the state, although he sees the state as contributing to the rise and decline of nations, to the expansion and contraction of religions, to the leveling or differentiating of social distinctions, to the growth or decline of languages, these facts are not assimilated in the juristic construction he builds because of the dualism of spheres which he has posited at the first. In jurisprudence the state is still sovereign and the *Herrscher* is still supreme. These concepts need not be revised. But the scientist must recognize that, outside of the realm of jurisprudence, they do not hold.

As a jurist Jellinek reviews the various theories of the nature of the state: those which look at it simply as a fact, pure and unadulterated; those which look at it as a condition; those which regard it as identical with one of its elements, the people or the ruler; and those which look upon it as an organism. He reviews the subjective theories which see the state as a spiritual-moral organism rather than as a physical one. The consideration of society or the state as organism he opposes, since this may lead to false analogies. Therefore, juristic science needs a better term.[15] Such a term, free from all analogies, is the term *Verbandseinheit*, which we might translate as a unified group, as a group entity, or as "association." All societies are such associations, and so is the state. Social theory seeks to view it thus. The state is the will-relationships of a multitude of human beings, some of whom command and others obey. These individuals build the substratum of the state, which includes the territory they inhabit. The unifying principle in all the manifold will-relationships which appear in their totality as the state is essentially a teleological one, i.e., one of definite purpose. Of course, there is a spatial unity, which comes from territory; and a cohesion in time, temporal unity; and a formal unity which comes from the structure of

[15] *Ibid.*, p. 137.

the organization. But primarily the unifying element is the fact that the state has a purpose which is permanent and cohesive. Along with its purpose, whatever it be, it possesses power to enforce its will. "The State is a group-entity of human beings settled on a given territory, endowed with original power of domination."[16]

Juristically speaking, the state is a corporation. Personality for it simply means that it is a subject[17] of law, a *Rechtssubjekt*, standing in relation to the legal order.[18] The question arises immediately, once definition is ascertained, of how to justify the state as defined, of the nature and the scope of state purposes, and, finally, of the nature and meaning of sovereignty. Juristic justification is impossible in spite of the many attempts[19] to explain why the state has a right to coercion, why the individual must permit his will to be bent and his interests to be sacrificed for the collectivity. Actually the state is justifiable only through the purposes it achieves[20]—in its concrete manifestations, in the fullness of its historical being. In any justification the original purposes which stimulated their achievement are a necessary consideration. Here, again, there are a number of current theories. According to some, the state has a universal purpose in historical evolution; according to others, each particular state has its own purpose; and according

[16] "Der Staat ist die mit ursprünglicher Herrschaftsmacht ausgerüstete Verbandseinheit sesshafter Menschen" (*ibid.*, p. 159).

[17] It must be understood that "subject" here means *Träger* or *maître*, not subordinate.

[18] "Legally, the state is a corporation of territorially settled people endowed with original power of domination, or to use a new term, a territorial corporation invested with original power of domination" (*ibid.*, p. 161).

[19] Jellinek reviews the religious-theological theories; the theories of force justifying itself; legal theories of the state as an evolution from patriarchal or patrimonal or contractual law; ethical theories of the state as the donor of the greatest good; psychological theories which justify it on the basis of psychological necessity, fear, gregariousness, etc. But he refuses to accept any of these.

[20] Jellinek, *op. cit.*, p. 204.

to still others, the state has no purpose at all—it is, simply because it is. Jellinek holds the real question, the only one empirically solvable, to be: What purpose does the institution of the state have for its members and for its community at a given time? It is too much of a generalization to say, e.g., that the general purpose of the Roman state was conquest; of England, political freedom; of Spain, religious unity; of Germany, freedom; of Russia, civilizing northern Asia. None of these statements is true, although there is an element of truth in each. It is true that every state, at every moment, has its own purposes for itself and for its members, but this does not hinder the recognition of a general, pervading, purpose. That purpose has been thought to be the greatest happiness of the members, in the eudaemonistic-utilitarian theory; it has been the greatest good, in the ethical theory. Both of these theories, however, imply complete—one might say absolute—power on the part of the state to do anything necessary to the achievement of these purposes. Other theories set up purposes which serve rather to limit the state's control over the individual. The purpose of the state in these is security, or liberty, or legality. All theories have their *raison d'être* in the historical conditions from which they evolved. Some are the result of an attempt to protect the individual from an increasing state absolutism. Others are the result of the need to justify the original extension of the state's activity to his advantage. What Jellinek concludes, as a result of his survey of the thought on the subject, is "that all common purposes fall within the sphere of state activity."[21]

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[21] "The relativistic theories, which take the state purpose from the momentary conscious content of a people and the epoch, belong to the most recent types of historical thinking. The most important of these theories agree in this: that all common purposes fall in the sphere of state activity" (*ibid.*, p. 223).

Yet there are certain obvious limitations on state purposes which result from its very nature. The state, for instance, whose control is an external one, cannot control or reach what is exclusively internal to the individual—his religious beliefs. It cannot control such purely physical elements as the health, length of life, number, or physical strength of its members. It cannot create the economic goods or the essentially cultural elements of its society; for these lie in individuals and in the nonpolitical groups. It has very definite effects on the economy and the culture of its society, but these are concomitant, indirect effects, which find no place in a consideration of conscious purpose; for these are effects unconsciously achieved.

Essentially, the sphere of the state is "the sphere of the exclusively common, i.e., externally effective, reachable, human acts."[22] Jellinek calls it the sphere of *solidarische menschliche Ausserungen.* Such spontaneous expressions of solidarity as religions, nationalities, classes, etc., are beyond state control; they arise independently of the state. We are witnessing, however, an increasing expansion of the justified sphere of state activity. Some activities it assumes as exclusively its own; others it approaches to regulate, support, foster, or prohibit as they find their externalization in the individual or social activities.[23] Defense, order, justice, it has assumed of old and considers as exclusively its own. The maintenance of these, however, has meant a continual extension of its solicitude for other interests with which these are essentially related. The fiscal problems bear on all these functions. They lead to a direct concern on the part of the state for all the economic interests in social life. From its military concerns, as well as its economic, the state is led to an interest in the means of communication, post, telegraph, railroads; in health, education,

[22] *Ibid.*, p. 226.
[23] *Ibid.*, p. 228.

state subsidies, industrial concessions, etc.; and, above all, in scientific advances. The extent of its interests should include not only individual and national but even the general interests of humanity.[24] Briefly, the state is justified functionally by the extent to which it realizes the common interests of the group it unites in so far as these are amenable to influence of an externalized character.

How the state first originates is a question of conjecture. Whether it originated from the family or from the horde is still hypothetical. But this is apparent: that the process of building a state was at the same time a process of building the law; that historically law and the state were bound together from the start.[25] From which it follows that certainly there is no possibility of legal justification for the state; for law must exist before the state in order to justify the latter. Whereas the state appears first as a historical-social institution in which law inheres; it reflects formally the relationships of individuals within it. Legally, therefore, the state exists of its own will. Its act of coming-to-be is not a legal act; no law can call forth its existence. But with its creation, its law comes.[26]

The state may undergo various changes without ceasing to be the same state. "An association is the same so long as the elements of the association remain uninterrupted in their temporal continuity and the concrete purposes of association are in large measure still taken care of."[27] Thus changes in actual membership, in extent or sphere of domination, or in form of

[24] *Ibid.*, p. 237.

[25] This is the starting point of Krabbe's theory of sovereignty. A development of this point leads Krabbe to the sovereignty of law; cf. his *Lehre des Rechtssouveränitat* (Gröningen: J. B. Wolters, 1906), and his *Modern Idea of the State* (New York: Appleton & Co., 1922).

[26] Jameson, *Treatise on Constitutional Conventions* (Chicago: Callaghan & Co., 1887), pp. 173 ff.; cf. also Max Farrand, *Legislation of Congress for Government of the Territories* (Newark, N.J.; W. A. Baker Co., 1896). Jellinek cites the case of South Dakota.

[27] Jellinek, *op. cit.*, p. 252.

constitution are not vital to the life of the state. This explains why England, for example, even after it united with Scotland or with Ireland, is still England. On the other hand, Sardinia ceased to be a state because it was incorporated in the Italy which established new organs, a new seat of government, and a completely new setup and sphere and purpose. Of course, a change may occasion the state's loss of sovereignty, as when it enters a *Bundestaat*, but its statehood still remains.

Actually the state is, according to Jellinek's conception of historical evolution, subject to progressive change in the form of its apparition. He traces its various characteristics in the Israelitish, the Greek, the Roman, the medieval, and the modern states. The dualism of dominating force in the old Israelitish state, divided between the expounders of God's will and the king, possessor of power—popular freedom, which permitted it to choose its king, or to reject him; absolute God-given princely power which recognized no legal, but only religious limitations—are the contribution of the Old Testament to political theory. In the Greek world we find a unified, independent, self-sufficient assembly of citizens inhabiting its own territory and comprising at once a religious and a political community, with definite rights for its citizens and with legality as an accepted principle. The only difference between the Greek community and the modern state is the former's failure to recognize human personality as such. It contained slaves and strangers. In the Roman state, for the first time, all power is centralized in one person. In the medieval state this unity was lost to a dualism overcome only by the modern state. The conflict between the king and the people, between the church and the state, between feudalism and monarchy, has left its impress on the modern state. Certainly this remained: that the individual has rights against the state. His rights as well as those of corporations and classes and religions are the result

of that past experience. And these rights are inscribed in the constitutions and laws of modern states.

This brings us to the question of what, according to Jellinek, is law. And his answer is significant as an expression of the modern emancipation from natural-law philosophy as well as indicative of the newer approach to the problem. Law is psychological; it is part of human intellection and exists in our mind. It is a sum of rules for human conduct which differ from religious or ethical rules because legal norms show the following essential characteristics: (1) they are norms for the external relations of humans to one another; (2) they are norms which come out of a recognized external authority; (3) they are norms whose obligatory character is guaranteed by an external power.[28] All law has, as an essential quality, a *Giltigkeit*, a validity or currency. Only then is a legal rule part of the legal order. A law no longer current, or a law which has still to achieve currency, is no law in the true meaning of the term. A norm is valid, then, when it has the capacity of affecting a motivation, of determining will, which capacity rises from the original conviction that we are obliged, duty-bound, to obey it. The positiveness of law rests, in the last analysis, on the conviction of its validity—a purely subjective element on which the entire legal order builds, in fact, a purely psychological element. Jellinek avoids the danger into which this psychological basis of law may lead in those who are interested in justifying resistance to the state, like Laski and other pluralists. This psychological conviction is that of the average of the people, the majority. In dealing with convictions where mass psychology is involved, the contrary belief of a minority is necessarily disregarded.

Therefore there can arise conflicts in individuals which cannot be resolved with the juristic maxims here mentioned. This reveals

[28] *Ibid.*, p. 303.

itself in conflicts of state and religious norms. . . . . The jurist cannot concern himself with this conflict so long as it is limited to a small sphere of persons and to isolated events. . . . .[29]

Jellinek recognizes the force of dominant public opinion, of popular support. The theory that law is based only on force does not realize how powerless law is when only state force seeks its enforcement. "Legal norms are not so much coercion as guaranteed norms."[30]

Jellinek recognizes the psychological nature of public opinion and emphasizes it as a basic support of law. The factual becomes normal; the customary, legitimate. Law exists as soon as the real activities of state life are translated into norms which express, as to those relationships, the judgment that the relationships are as they should be. What this concept implies is that actual relationships precede legality, that law is not a closed system; for it changes with dynamic relationships. The idea of the *Geschlossenheit des Rechtssystems* is not adequate. Lacunae exist in every legal system and become apparent as new situations arise.[31] Law is a social function, an expression of human society concerning the external relationships of its individuals. It follows, necessarily, that the expression of this law obligates the state. "The state obligates itself to its subjects by creating a law—however the law may arise—to apply and execute that law."[32] Not simply the state organs but the state is obligated. Law is a unilaterally created obligation, since it is none the less binding. Only by observing the binding force of these unilaterally created obligations can we conceive of rights and duties for the state—a conception increasingly accepted in modern times. "This is sure, that in modern times,

[29] *Ibid.*, p. 304.
[30] *Ibid.*, p. 306.
[31] *Ibid.*, p. 326.
[32] *Ibid.*, p. 333.

the conviction that a state is bound by its own law is continuously gaining ground."[13] The entire range of constitutionalism in government indicates it. International law, too, shows that the state is subject to obligations and law. Of course, the ultimate basis of international law depends on recognition by the individual states. But such recognition is no longer questioned. True, the community from which international law emanates is one without a superior force organization; but it is a law between co-ordinates and has all the guaranties of law but force. The international society whence it emanates is an anarchistic one, and international law bears this character. But it is law, nevertheless.

The state, then, according to Jellinek, appears bound by internal and external relationships. This limitation, as a matter of fact, makes the state legal. A dominating force, he writes, becomes legal when it is limited. "Law is legally limited force."[14] Since this is so, it follows that the elements of the state—its territory, its people, its dominating force—stand in very definite relationships legally. The territory of a state can maintain only one state at any given time; except in condominiums—which are really coimperiums; in federal states; and in occupations during war times. Treaty relations may permit the intrusion of a foreign state, but this is legally a delegation of sovereignty by the native sovereign. It must be emphasized that the relation of the state to its territory is not that of dominion, but of imperium, not of owning, but of commanding. Commanding is a relationship which exists among people, not a relationship between persons and things. Therefore, the relation of the state to its territory is a mediate one, through its relationship to its people rather than directly over the land as property. An important result of this conception of

[13] *Ibid*, p. 334.
[14] *Ibid.*, p. 348.

imperium is the fact that imperium cannot be divided; and with the notion of its indivisibility follows the indivisibility of the state. Thus the modern conception of the state, according to Jellinek, is of an indivisible unity.

The relationship of the people of a state to that state is clearly defined by public law. The people of a state are those individuals who in their totality compose it. They are the subject and the object of its law. They are its citizens, i.e., those who have a claim on the state force (*das Staatsgewalt*). As such, they are individuals with rights which the state must recognize. The strenuous attempts of the absolute state to assert itself failed to destroy the consciousness of the priority of individual rights.[35] The recognition of the individual as a person is the basis of all legal relations. As such, he is subjected to limited force only to the degree which law prescribes. As such, he is entitled to positive administration of his individual interests by the state, justly and legally. As such, state force must somehow or other come from the people. Either through the suffrage which is a public function of the people as an organ of government[36] or through a general conviction of its legitimacy, tacitly assumed, must the people acquiesce in its exercise.

The third element in the nature of a state, its state force, its *Staatsgewalt,* is presumed to be a unity. It is an *Einheit,* even as territory and people are legally single entities.[37] It is either dominating force (*Herrschergewalt*) or non-dominating

[35] Here Jellinek refers to Esmein, *Eléments de droit constitutionnel* (Paris: Tenin, 1914), pp. 139 ff., and the English and American emphasis on individual rights (Jellinek, *op. cit.*, p. 370 ff.)

[36] He notes his accord with Esmein and Hauriou (*ibid.*, p. 281).

[37] Jellinek argues as follows: "Every assembly of purposes is in need of direction by some will. The will which cares for the general purposes of the group, which orders, and directs the fulfillment of its orders, presents the force of the assembly. Therefore every assembly, insofar as it differentiates itself from its members has its own proper force" (*ibid.*, p. 386).

disciplinary force. *Herrschergewalt* is irresistible force. Domination means the ability of unconditional commanding and coercive fulfilment which subordinates cannot escape. *Herrschergewalt* is the criterion which differentiates state force from all other forces in modern times. And public law is the study of state force—its organs, its limits, its rights, and its duties.

This leads us directly to the relation of state force and sovereignty. In the first formulation of the theory of sovereignty at the hands of Bodin, indeed, the two—sovereignty and state force—were identified. Jellinek, however, chooses to redefine sovereignty in the contemporary scene. He traces the theory through to its historic origins, approaching the modern significance which he would attach to the concept genetically. Two things become immediately apparent from his historical survey: first, that it is not an absolute, unchanging concept and, second, that it was not always a juristic concept.[38]

From Aeneas Sylvius down through Bodin, to whom Jellinek accords the title of father of the modern theory of sovereignty, Jellinek considers the doctrine of sovereignty a

[38] "Sovereignty in its historical origins is a political concept which later became transformed . . . ." (*ibid.*, p. 394).

Aristotle's concept of the state as an autarchy is not, in Jellinek's mind, related to the concept of sovereignty. Autarchy means self-sufficiency for the citizens within the state to reach a full development within it. It has no implications for the modern concept of sovereignty with its emphasis on independence. It was an ethical rather than a juristic concept. Nor was the concept of sovereignty present in the Roman world, although the reality of the concept was there, unrecognized. The failure to recognize it was due to the lack of opposition of the state force to other powers in society. In the early modern period, on the other hand, the state as a power was subject to challenge from three sides. The church, the Holy Roman Empire, and the feudal system with its large fiefholders and corporations sought for themselves the position the state was striving to attain. With the beginnings of humanism, in the fifteenth century, the old classical concept of the state as a unity reappeared in Christian Europe. Aeneas Sylvius enunciated the claim for the Holy Roman Empire that it was a unified community, irresistibly dominating internally, and externally an independent power (*ibid.*, p. 409).

political doctrine which seeks to declare the independence of the monarch from all powers conflicting with him. He notes, however, that even in Bodin the doctrine of sovereignty is not kept pure, but is rather identified with state force. There is no doubt that sovereignty, in the theory of Bodin and his successors, really meant supreme state force. They so define it. Therefore, Hobbes and Locke and Blackstone and all the others feel justified in searching for its content.[39] Jellinek chooses to assume that modern sovereignty really is something logically divorced from state force; that—as he credits Albrecht and Gerber with showing—it is not state force, but a property of *completed* state force, *independent* state force. He concludes, from his survey of its past history, that the attempts made by some writers to eliminate it as a concept of public law are themselves not in accord with the spirit of history. There is need to avoid the confusion of the past, however, which identified the sovereignty of the state with that of its organs, or the confusion which resulted from seeing sovereignty as an absolute rather than as a historical category.

The logic of his argument, that sovereignty ought to be preserved in the present public law because of its historical past, is difficult to concede in view of Jellinek's own insistence on relativism and change. Nevertheless, such is the nature of the argument he directs primarily against Preuss and others who attempt to shelve the concept as historically antiquated.[40] Indeed, it is obvious that what remains for Jellinek after his analysis is done is only an abstraction of one aspect of modern political government—a far cry from Bodin's "absolute power over persons and property." Historical evolution, even in Jellinek's survey, shows us at present nothing more

[39] *Ibid.*, pp. 420 ff.

[40] Preuss, *op. cit.*, p. 94. Charles E. Merriam, *History of the Theory of Sovereignty since Rousseau* (New York: Columbia University Press, 1900), summarizes Preuss's position on pp. 207 ff.

than a shell, a word surviving as a vestigial remnant, creating confusion by the variety of connotations and meanings which have accrued to it. It is against this confusion that Preuss objected. But Jellinek chooses to rehabilitate it with a new significance.

The state can determine what constitution it will assume. This is the essence of sovereignty. It must, however, have some constitution, some definite form of law. This law, in fact, becomes such only through the quality which makes it binding upon the state force as well as upon the individuals in the state. Therefore, the constitution is law, and therefore, too, international law is law, since "law is the norms of relationship between persons emanating from an external authority and guaranteed by external means." And the authority of international law is external to the individual state. There is no doubt that the content of international law develops from the demands of international relations and from the convictions of peoples and statesmen. What happens is that the state legally remains subject to its own will. Here, again, Jellinek is hard to follow. If it is subject to its own will, of what potency are the guaranties which he concedes are existent? Should not the logic of his argument lead to the admission that, although the international law is the result of a union of co-ordinates, nevertheless, so far as any minority is concerned, i.e., so far as any one state is concerned, the *Einheitswill* of the *Verband* may impose its external authority? How else will the laws have validity? It is certain that laws still in the process of becoming are not yet true laws. If international law merits its name, it is limiting to more than the extent of the individual state's will. If not, it is no law. Perhaps it is because of this difficulty that Jellinek calls it "anarchistic" law. Some who recognize more emphatically the possibility of coercing a single state, in spite of its will, argue for the validity of a legal source stand-

ing above the individual states.[41] Jellinek considers this an actual denial of the course of historical development in an attempt to circumvent the need for his concept of auto-limitation.[42]

For auto-limitation is more than simply justified by history; it has its analogy in the private-law notion of unilateral agreements and in the ethics of Kant. Jellinek simply transfers the philosophy of ethical self-obligation to the realm of jurisprudence.[43] This ethical theory results in a change in juristic theory to accord with it. In the concept of the auto-obligation of the state lies as little contradiction as in ethical autonomy. So that illimitability, which was formerly considered a characteristic of sovereignty, is deniable. The state can limit itself even as it can determine itself. "Sovereignty is the property of a state-force due to which it has the exclusive capacity of legal self-determination and self-restriction." So we come to a concept of sovereignty in modern times which is far, far from the absolute power over persons and property with which it used to be identified. It now means that no one can limit it but itself, and that it can free itself from any existent limitation, although never from all limitation. And even its shifting from one limitation to the other must be through legal form. Obviously, this purely formal conception of sovereignty gives no indication as to the content of the state force. It may vary, expand, or contract, without affecting the fact of sovereignty. For there is, in truth, no essential connection between state force and sovereignty. Sovereignty is simply a superlative. State force is state activity.

This analysis of sovereignty and its reinterpretation are of practical significance in approaching the very vital problem

[41] Or, as Heinrich Triepel, for a dual system of law (*Völkerrecht und Landesrecht* [Leipzig: Hirschfeld Co., 1899]; cf. chap. v, on Kelsen.

[42] Jellinek, *op. cit.*, pp. 436-37.

[43] *Ibid.*, p. 437.

of federalism in Germany. In asserting the relation of sovereignty and state to be an easily severable one under modern conditions, without any loss of statehood for the nonsovereign state, it served as a satisfying doctrine to the member-states of the German Reich. They were thus able to retain their traditional character as states while participating in the common union. What gave them statehood was the possession of state force and state organs. As to sovereignty, it was a quality inherent in the general government of the united states, the *Bundesstaat*. In view of the relative prestige value of the two characteristics of political societies, the essentially significant term was "state." It was their characterization as states that the members had no desire to forfeit. And Jellinek's formulation permitted its retention.[44]

If we sum up Jellinek's entire attitude toward sovereignty, then, we find this one fact outstanding. Actually sovereignty is constitutionalism—auto-determination and auto-limitation under legal restrictions which must be observed by the state even in changing its form. If we view him in relation to the Esmeinian juristic formulation, we find the same emphasis on law as being the command of a sovereign, a norm emanating from an external authority, enforceable by external power, which finds its best support, practically, in the obedience of the majority due to public opinion or to the guaranties of society. We find rights and obligations on the state as well as on individuals. And we find that same emphasis on individualism, on the autonomous sphere of human personality where the state cannot reach.

The essential similarities of national sovereignty and of state sovereignty result from the fact that both theories, albeit deriving their justification from somewhat different ration-

[44] See Merriam's discussion of the whole matter of federalism, *op. cit.*, pp. 193 ff.

alizations, are juristic descriptions of an established political and legal order with which they are substantially in accord. The monistic, supreme, constitutional state existed alike in France and in Germany. The rights of the individual and the limitations of government were recognized in both. The doctrine of Rousseau penetrates the theory of Esmein through the school of reason and the theory of Jellinek through the doctrines of Kant. Individualism and democracy combine with representative government and a unitary society.

CHAPTER IV

SOCIOLOGICAL JURISPRUDENCE—DUGUIT

THE SURVEY OF Esmein and Jellinek reveals formulations of analytical jurisprudence, formulations agreed that the nature of law is subjective and the character of its subject is sovereign. Sociological jurisprudence, on the contrary, considers law as objective and proceeds from that to deny the very necessity of the concept of sovereignty. It reflects, not the dominant incumbent of political power, but the challenging forces of social life. It presents a juristic formula which shifts the emphasis from the old "statism" to syndicalism and to public services. It is a "societal" jurisprudence which would bind the governing group to the rule of law, to the rule of social solidarity, in which "society" is primary.

One cannot escape the conviction that the most renowned and outstanding juristic representative of the newer attitude is Léon Duguit. He towers as the champion of the twentieth century school of objective law. In his analyses we shall discern the course of legal evolution and along with it the new status of the concept which originated with Bodin.

Duguit approaches the problem with a glance at the past history of subjective law and of sovereignty which reveals the historical development from monarchical to national sovereignty. From power inherent in and issuing from the king, the notion moved to power inhering in and issuing from the state representing the people. The course of that development now, however, tends away from popular or national sovereignty. There is already no correspondence between nation and state in the pre-war Austrian state or in the United Kingdom. Nor are the French colonials members of the French

nation, though certainly they are part of the state. There is grave doubt, in general, as to the unity, the integral "oneness" of the state, which is so basic an assumption of the old theory. Decentralization and federalism are two important facts in modern life which challenge it. The attempt of the older formulas to explain decentralization by the distinction between the possession of sovereignty and its exercise is a mere linguistic quibble. It does not do away with the fact that during its exercise, at least so much of sovereignty as he uses is in the hands of its exerciser, and it is no more an indivisible, unified power. "To distinguish between *possession* and *exercise* is purely verbal reasoning."[1] Federalism is almost generally prevalent in the New World and long existent in Switzerland and Germany.

Duguit elaborates a cogent presentation of the problem of federalism. If the union-state symbolizes the nation, then the member-states personify only part of the national personality; on the other hand, if they each personify a whole, then the union-state does not. Esmein failed to see this and permitted himself to conceive of the possibility of the people's dividing their sovereignty in a federal state. Among the Germans, the problem resulted in the denial of sovereignty in either the one unit or the other. Sovereignty resides only in the member-state for Seydel; in the union-state for Jellinek. In Gierke we find the member-states assuming the position of individuals, and the union-state, the position of the unitary state in the old jurisprudence. The autonomous member-states form a super-state in which they participate not only in the exercise of its power but in the creation of its will. It is a corporation of states as a state is a corporation of individuals. For Duguit, all this is a play of words. And the logic, such as it is, is insufficient to justify the old theory.

[1] Léon Duguit, *Les Transformations du droit publique* (Paris Colin & Cie, 1913), p. 22.

Justification of juristic doctrine comes from the nature of its functioning. If a doctrine can support and sanction rules assuring the satisfaction of needs which impose themselves on men of a given society at a given time, it has reality; if not, no. On the one hand, it must be able to sanction limitations on the possessors of power concerning certain things, and on the other, it must be able to support the proposition that they ought to do certain things. But "the modern conscience is today profoundly penetrated by the idea that the system of imperialistic public law is incapable of supporting and sanctioning these two rules."[2] It is certainly incapable of protecting the individual against despotism. Moreover, the popular conscience demands activities of the state which the older jurisprudence does not sanction; it demands activities—apart from the traditional functions of order, justice and defense—in which the state cannot proceed as it does ordinarily in the prosecution of a war, the meting-out of justice, or the enforcement of order. In such activities domination, command, imperium are fitting and necessary, but when the newer activities are public services—social or economic in nature—domination is irrelevant and out of place.

In those great state activities which increase every day, education, the poor law, public works, lighting, the postal, telegraph and telephone systems, the railroads, the state intervenes in a manner that must be regulated by public law. But this can no longer be based on the theory of sovereignty. It is applied to acts where no trace of power to command is to be found. Of necessity a new system is being built, attached indeed by close bonds to the old, but founded on an entirely new theory. Modern institutions, under the new and fruitful jurisprudence of the counsel of state take their origin not from the theory of sovereignty but from the notion of public service.[3]

[2] *Ibid.*, pp. 26–27.

[3] Léon Duguit, *Law and Modern State* (Published by The Viking Press, Inc., New York, Copyright, 1919), p. 31.

Instead of imperium, there arises a completely different conception of the basis of law: not sovereignty but public service becomes the dominant idea which expresses the modern situation.

Public service is the basic idea in Duguit's system.[4] The transformation of public law leads to it. It signifies the existence of a legal obligation on the rulers of a given country—that is to say, on those who in fact possess power—to insure without interruption the fulfilment of certain tasks. What these tasks are, is always a relative matter.

> Any activity that has to be governmentally regulated and controlled because it is indispensable to the realization and development of social solidarity is a public service so long as it is of such nature that it cannot be secured save by governmental intervention.[5]

These activities are always in a state of flux and change but always have included, at least, national defense, internal security and order, and justice. What other activities it will assume in our modern order will be largely determined by the demands of modern interdependence. Duguit sees in the increasing interdependence a transformation of public law. The increase of legal rules and regulations concerning the additional functions of the state presents us with a mass of rules which govern the organization of public utilities and aim to assure their regular and uninterrupted function.[6] Public utilities, themselves, are becoming institutions of public law whose operation government is obliged to maintain. The new basis of public law has become no longer command but organization.

Objective law, as all law, is psychological. The material,

[4] *Ibid.*, p. 39.
[5] *Ibid.*, p. 48.
[6] *Ibid.*, pp. 48 ff.

intellectual, and moral needs of the mass of men today lead them to a psychological creation which they term "law."[7] The implications of the change in the meaning of public law, from domination to collaboration, lead to further change;[8] to a change, for instance, in the nature of administration: it is no longer command but management. The new idea of public law leads to an increasing industrialization of public activity. It leads to a sense of state responsibility. The state is responsible for its activities and even for its omissions, for its lack of activity where it should have been active. Its laws, i.e., the statutes which its legislators pass, are simply the expression of the individual will of the men who make them. Administrative orders, too, are laws, expressing the will of the statesmen or civil servants who issue them. Noteworthy is this fact: Statutes and decrees are not the command of the sovereign; they are enforceable, however, by the coercive power of the state.[9] Organic rules, civil law, penal codes, civil service rulings are all sanctioned by the public need they fill and by the public service they perform. Each individual group develops its own law which serves to direct and order its relationships and those of its membership. Each department of governmental services has its own organic law and its own disciplinary measures. Certainly there is no monism in these developments. And the monistic, imperialistic approach of the subjective school of jurisprudence is inadequate to satisfy the demand for sufficient emphasis on this aspect of social facts.[10] Each department assumes responsibility for its acts,

[7] *Ibid*, p. 43.
[8] *Ibid*, p. 51.
[9] *Ibid.*, pp. 70–71.
[10] "Already our law has ceased to be based on the idea of a unified and indivisible sovereignty. It is and will be an objective law of government; but it is the law of government which does not command. It is the law of a government which serves the public need and secures the co-ordination of the modern corporate life" (*ibid*, p. 118).

with the guaranty of its actions and their effects coming either from itself or from its principal, the state.[11] Just as sovereignty has passed from legislation, so has it passed from administration. The heightened value of an administrative decree comes from its purpose. The criterion of its judgment comes from its successful accomplishment of its purpose.

Duguit recognizes lacunae in the current practices of government which indicate that social fact is not yet in complete accord with the new concept of public law. The achievement of administrative responsibility is, by his own admission, far

[11] Duguit believes that the state should be responsible for its acts and their results irrespective of the question of fault. When the state as a collectivity prejudices the rights or privileges of an individual or a group in the pursuance of collective ends, the state as a collectivity should repair the damage done. The older jurisprudence is willing to consider repairing damage, indemnifying a citizen only where there has been a violation of a legal rule by the state. Where the act has been within the legal limits prescribed, the state incurs no liability. This is the point of view of Teissier (*La Responsabilité de la puissance publique* [1908]), who writes: "Statutes are the highest example of sovereign acts; and without special provision the damage they may cause to private citizens can give rise to no action against the state before any court, administrative or other, on the ground of responsibility" (quoted in Duguit, *ibid.*, p. 200).

It is also the point of view of Maurice Hauriou who feels that it is desirable from the point of view of both good politics and ethics to indemnify individuals for administrative mistakes and prejudicial acts. It is meet that, where the public benefits from the loss of one individual, they share with him by reimbursing him. Still, as a jurist, he argues: "Mais si les raisons de convenance sociale ne manquent pas, les principes juridiques et les faits obligatoires sont moins faciles à trouver, du moins quand on veut respecter le régime de la puissance publique qui démande une certaine irresponsabilité dans certaines attitudes de commandement. Aussi, au point de vue juridique le problème des indemnités pecuniaires n'est-il pas susceptible d'une solution simple, et nécessite-t-il de nombreuses distinctions?" (Hauriou, *Droit administratif et droit public* [Paris: 1911], p. 482).

The problem of state responsibility has been treated in the following: Teissier, *op. cit.*; Tirard, *La Responsabilité de la puissance publique* (1908); Roux, *La Responsabilité de l'état* (1909); Marcq, *La Responsabilité de la puissance publique* (1911); Hauriou, *op. cit.*, pp. 482 ff. (he gives a bibliography of Italian and German sources); Duguit, *Traité du droit constitutionnel* (Paris: Fontemoing, 1921), I, 84–95, 352 ff. He reiterates the point of view described in the text.

from accomplished in England or America. Even in France there is no way of achieving responsibility for an entire class of acts connected with the constitutional relation of the chambers of the government.[12] Also, there is no way of achieving responsibility in a much more important sphere—that of diplomatic acts. And even where the courts can condemn administrative acts, they cannot enforce their decisions.[13] It is interesting to note how Duguit recognizes these facts and yet fails to assimilate them in his public law. They appear as gaps, as lacunae, in the transformation which is taking place. He feels sure that the process of historical evolution will fill them; that they, vestigial remains of the old concept of sovereignty, will disappear; that the future will present the justification of his concept of public law. The favorable facts which he does note as already existent are sufficient to confirm his theory as that of the present. And since it implies state responsibility, it indicates the death of sovereignty. His argument assumes that sovereignty means complete and eternal irresponsibility; so the fact that on occasion we find that the state is responsible completely discredits it. Hence the transformation of public law results in the discard of sovereignty.

In view of the position Duguit assumes in modern jurisprudence as the outstanding representative of the objective school of law, of the anti-sovereignty school, it is of interest to resolve some of the general, pertinent problems which his attitude arouses, as well as to probe deeper into the reasons for his reactions to sovereignty. What was it that made it appear so essential to recast entirely the structure of public law in order to make it accord with reality? Certainly it was

[12] Such as convocation and adjournment of the chambers, closing a parliamentary session, the convocation of the electoral colleges, etc. (Duguit, *Law in the Modern State*, pp. 176 ff.).

[13] *Ibid.*, pp. 191 ff.

not that reality itself had been so radically transformed. We may have noticed the close similarity of the facts of his apperceptive mass to those of the outstanding proponent of subjective law, whom he originally set out to refute.[14]

The essential similarities between Duguit and Jellinek in their outlook on the social scene is clearly apparent—even from our preceding summary. Both agree on the evolving character of the state through a historical evolution. Both agree that the basis of determining the validity of a juristic system lies in its concurrence with the facts. Both concur that a juristic system under modern conditions should express the limitations as well as the positive demands of state force. Both recognize the increasing accretion of state functions in addition to defense, order, and justice. Even more, both recognize the real nature of groups and individuals within the state. Both, obviously, recognized the nature of the challenge from federalism and particular local communities. Yet Duguit felt impelled to recast the entire system, whereas Jellinek persisted in the traditional to a much greater extent. The question is, why?

Any attempt to answer causally, i.e., because of what forces, would lead us into realms of investigation which are beyond our sphere, for they involve an intimate knowledge of the life and intellectual conditioning of each of these jurists—a knowledge which unfortunately is not available to the author. We can, however, see where the divergence occurred and how it was constructed into a logical structure. With Jellinek we have already become acquainted. We have seen that he was familiar with the most recent, most advanced social science of his day. We have noted that he grants all the social sciences a place in his *Allgemeine Staatslehre*. But we notice, too, that he keeps them distinct from his consideration of *Staatsrechts-*

[14] Duguit indicates that he wrote his *L'État, le droit objectif, et la loi positive* (Paris: 1901) against the jurisprudence of Jellinek.

lehre. The only extra-juristic—or, as he would say, meta-juristic—concept in his study of public law is the analogy from Kant's ethics as to the autonomy of ethical obligation. Even there, he points to the obligatory character of unilateral agreements as a private-law concept with which his auto-limitation of the state may be paralleled. He attempts to exclude, so far as he can, every extraneous element from his jurisprudence.

With Duguit, on the other hand, the attempt is consciously to build up a new jurisprudence upon the basis of a more complete integration with the findings of sociology. His is the school of sociological jurisprudence. We have indicated the nature of his positive construction. An investigation of the elaboration and defense of his jurisprudence will lend some significant clues as to the possible causes of his dissatisfaction with the older jurisprudence. They will indicate some possible explanation for his antipathy to the older jurisprudence, which he arose to combat.

We need not labor the distinction between subjective and objective law, which is the beginning of his formal presentation of his system to the students of his theory.[15] Subjective law obviously is law issuing from a subject; objective law is law going out of society itself. In any society it would be necessary to assume the existence of a law anterior and superior to the state as a postulate, even if we could not prove it; simply because "the modern conscience feels the imperious necessity of a rule of law imposing itself with the same rigour on the state, possessing force, as on the individual subject to it."[16] The doctrines of subjective law, of individual inherent rights, are inaccurate. The thesis that there are rights inherent in man as such is a metaphysical a priori hypothesis; for man

[15] In his *Manuel de droit constitutionnel* (Paris: Fontemoing [Boccard], 1918).

[16] *Ibid.*, p. 2.

is always born into society. The assumption of the absolute equality of men is also inaccurate. Men are different and ought to be treated, even juristically, with regard to their differences. The further thesis of older individualistic doctrines that there is an absolute law for all societies and times is untrue because law is a developing, social phenomenon. With this preliminary negation, Duguit proceeds to elaborate a "socialistic" system of law.[17] He plants himself solidly on the sociology of Emile Durkheim[18] which derives from Auguste Comte. An incontestable fact of human life is the fact of social solidarity or interdependence which Durkheim has established irrefutably. It is due both to common social needs and to specialized individual needs, *solidarité par similitudes et par division du travail.* It is the basic fact in social life, embracing ultimately all humanity. It is the foundation of law.[19] At present men are slow to recognize it and are bound into all kinds of lesser social groups. Chronologically, however, there has been development from the horde to the family, the city, and the nation. In all these the same rule is innate. It is at one and the same time social and individual; social because it arises in society, and individual because it is contained in individual consciences. It is a single law, imposing co-operation, and yet diverse, since it means different obligations for different people of different aptitude and condition.

With his doctrine of law derived from the rule of social solidarity, Duguit deduces subjective rights from its very na-

[17] *Ibid.*, p. 7.

[18] *De la division du travail social* (Paris: Felix Alcan, 1893).

[19] "Par conséquent, une règle de conduite s'impose à l'homme social par la force même des choses, règle qui peut se formuler ainsi: ne rien faire qui porte atteinte à la solidarité sociale sous l'une de ses deux formes et faire tout ce qui est de nature à réaliser et à développer la solidarité sociale et mécanique et organique. Tout le droit objectif se résume en cette formule, et la loi positive, pour être légitime, devra être l'expression, le développment ou la mise en œuvre de ce principe" (Duguit, *op. cit.*, p. 11).

ture.[20] If law imposes obligations, it implies the right to fulfil those obligations. Rights are due to social duty rather than to any quality inherent in the human. This is as true of the traditional rights of liberty and of property as of any other.

In addition to the law of social solidarity which we would assume as a postulate of any society, if it were not a fact, another phenomenon is common in all societies we know. This is the differentiation into rulers and ruled, the existence of political authority. The rulers are those who command and can secure the execution of their orders by material constraint when necessary. This is a purely social fact without any inherent legitimacy in and of itself. Its legitimacy comes from its relationship to legality.[21] Functionally, the ruling group may be divided into legislative, juridical, and administrative, depending on whether it formulates the rule of law which it will impose or decides on violations of law or itself performs acts in accord with objective law. But whatever it does must be in accord with law. The jurisprudence which made the state a subject of law, which attributed to it imperium and patrimonal life as well as territory and people and government, does not reflect social facts. It does not recognize the relationship of the state to law.

The accurate description of social fact as it relates to the ruling group, to the state, involves six positive elements,[22] which revolve about the fact that the state is simply the real men who actually possess force. They are—and therefore it

[20] Duguit admits his obligation to Comte's *Catechisme positiviste* (*ibid.*, p. 12).

[21] *Ibid*, p. 25.

[22] "Elle se composera de six elements d'ordre purement positif: 1. une collectivité sociale determinée; 2. une différentiation dans cette collectivité entre les gouvernants et les gouvernés, ceux-la étants gouvernants parce-qu'ils monopolisent une plus grande force; 3. leur obligation juridique d'assurer la réalisation du droit; 4. l'obéissance due à toute règle générale formulée par les gouvernants pour constater ou mettre en œuvre la règle de droit; 5. l'emploi légitime de la force pour sanctionner tous les actes conformes

is—obligated by the same law which binds everyone, and their right to use their force is subject to their duty to fulfil the social function which their superior strength makes possible for them. Public law is simply the body of rules which apply to these men and their agents in their relations between themselves and with others.[23] It is an evolving phenomenon arising in individual consciences, as we have already found, externalizing itself in custom and then achieving a status in written law. But there is no innate difference between written and unwritten, or, for that matter, between constitutional law and ordinary law (except in the method of legal amendment), or between public law and private law, except that they are divided for convenience in differentiating between subject matter. There is law, a rule of law, from the very moment that a violation provokes a social reaction[24] in the individual consciences of the members of the collectivity.

Duguit emphasizes here that this insistence on the ultimate base of law does not by any means make him an anarchist. (This came as a result of a challenge by Hauriou, *Principe de droit public* [1919].) There always is and always must be coercive power, he reiterates; but its legitimate use is contingent upon the collective reaction of these manifold individual consciences. It tends to disappear with the increasing approach of the transformation in favor of public services. Nevertheless, there is force; and the rulers, by definition, monopolize the greatest force.[25]

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au droit; 6. enfin le caractère propre de toutes les institutions tendant à assurer l'accomplissement de la mission obligatoire des gouvernants ou service publics" (*ibid.*, p. 30).

[23] *Ibid.*, p. 34.

[24] *Ibid.*, p. 45.

[25] "L'élément essential de l'état est la force. L'état est avant tout une force qui s'impose par la constrainte matérielle. Il n'y a véritablement un état dans un pays donné que lorsqu'un homme ou un certain groupe des hommes dispose dans ce pays d'une force matérielle prépondérant" (*ibid.*, p. 69).

The exercise of that force—to repeat it again—is limited by its legitimacy, contingent on its conformity to the rule of law. Simply put, the state is not a force which commands—a sovereignty—but a co-operation of public services organized and controlled by the rulers.[26] Factually, Duguit sees the state so, as a co-operation of public services. Even war is a public service. Everything becomes amalgamated to the new concept.

Having in mind that this conception was elaborated in the face of older constructions, let us see, specifically, what the faults of the latter were that made them *persona non grata.* Duguit considers Esmein's theory of national sovereignty, the prevailing doctrine of French jurisprudence, an expression of the nation's unconditional right to give orders to all found on the national territory. This commanding power is vested in the juridic personification of the nation, the state, which possesses external and internal sovereignty as we have already seen. This means that the sovereignty is a power of will, a power of commanding, and a power of commanding independently.[27] It means that sovereignty is a subjective right of a personified state. It means that the state's will, by its very nature, is superior to any individual will or collective will found on its territory. Esmein was not concerned particularly with the problem of the relation of noncommanding acts to sovereignty. Sovereignty meant primarily the ownership and control of political power by the nation. How it was exercised in fact has little to do with the validity of this juristic claim. More pertinent to this latter was the structure of the governmental setup, the method of suffrage, and the limits on administration. But Duguit finds the problem insurmountable. How can the state escape its natural function of performing

[26] *Ibid.*, p. 72.

[27] "Dans cette souveraineté ainsi conçue, on distingue trois éléments. La souveraineté est 1. un pouvoir de vouloir; 2. un pouvoir de commander; 3. un pouvoir de commander indépendant" (*ibid.*, p. 81).

acts which are not commanding—acts in which it binds itself by contract under private law? How can it do so and still retain its sovereign character? Therefore, Duguit reacts to Esmein by denying the interpretations he presents and the conclusions he draws.

An analysis of Duguit's reaction to Jellinek, on the other hand, indicates a basic agreement as to underlying and significant facts. Duguit recognizes that Jellinek is attempting to attenuate the results of the dominant doctrine that law is the creation of the state when he states that law is made not by state constraint but by social guaranties.[28] Jellinek admits, as does Duguit, the force of public opinion on the state and on law. We find Duguit sensing, too, a basic accord between himself and his famous adversary in the latter's elaboration of Ihering's attempt to subordinate the state to law.[29] He points out that Jellinek is trying, through his doctrine of auto-limitation, to subordinate the state to law juristically, without destroying its sovereignty. But Duguit thinks it cannot be done. Voluntary limitation is no subordination. The doctrine performs a sleight of hand. It is sophistry.[30] Yet he recognizes in Jellinek what he calls "scruples." Jellinek also has an inkling of what Duguit is emphasizing, but not enough. He (Jellinek) sees a law truly superior to the state but is not definite either as to its basis or extent.[31]

[28] "Il convient aussi de signaler l'effort fait par Jellinek pour attenuer les consequences decoulant logiquement de la doctrine dominant, d'apres laquelle le droit est une creation exclusive de l'état Pour qu'il ait règle de droit il faut, mais il suffit d'après Jellinek, qu'il y ait des garanties d'application de cette règle, garanties qui consisteront sans doute le plus souvent dans l'intervention de la force étatique, mais qui peuvent consister en autre chose, par example, resider dans la force de l'opinion publique, dans l'organization générale de l'état" (*Traité du droit constitutionnel* [Paris Fontemoing, 1921], p. 32). And he quotes Jellinek, *Allgemeine Staatslehre* (Berlin: O Haring, 1900), p 303

[29] Duguit, *Traite du droit constitutionnel*, pp 488 ff.

[30] *Ibid.*, p. 491.

[31] *Ibid*, p. 491.

A perusal of those citations to which Duguit refers,[32] and of the complete formulation in the *Allgemeine Staatslehre* definitely indicates that Jellinek was truly aware of the psychological and social nature of law. If we understand, and it is essential that we do, that the state for Jellinek is the whole of the society rather than the rulers, the governors, alone, we shall be in a position to understand his problem better. The state for him is the whole society. It is "die mit Herrschaft ausgerüstete Verbandseinheit sesshafter Menschen"; it is the complete entity. This concept is in accord with the Hegelian concept which views the state as a totality. In Duguit, however, the state is only the men who rule. The law which binds them and all others, the rule of social solidarity, is antecedent to them, but certainly not to the society within which it originates. On society, Duguit himself admits, this law is dependent. It does not antedate it, although it accompanies it. It gets its validity from the individual consciences that react to it. Essentially this is what Jellinek says. And there is no doubt that, with regard to the society as a whole, which Jellinek calls state, Duguit too admits that it sets its own rule of what and how co-operation, or even more broadly, social life shall take place. In admitting that at any given time society determines which of the many diverse possibilities of collective reaction shall dominate, Duguit is envisaging the same fact which Jellinek calls "auto-limitation." And within the given society, both are in essential agreement that the government is legally bound, that it is subject to law which is defined similarly by both.

The real significance of Duguit's criticism that "il ne dit point quels sont, d'après lui, le fondement et l'étendue de ce droit superior" seems to be disappointment that Jellinek fails to emphasize, as Duguit does, Emile Durkheim's law of so-

[32] Jellinek, *op. cit.*, pp. 302–6, 323–31.

cial solidarity. For it alone is the *fondement* and *étendue* of Duguit's superior law. Jellinek is, however, perhaps on safer ground than his critic in avoiding co-operation as the guiding rule in society. Duguit himself supplements it by a more concretely factual phenomenon, that of a differentiation of rulers (with force) and ruled. This additional fact serves as the real beginning of his analysis of the state. It serves as the initial fact for Jellinek. The single rule which Duguit labors so diligently to put at the basis of his theory is, in reality, diverse and individual. It is an interesting problem why he must have at all this single rule of social solidarity extending through all humanity when humanity, in the main, is not conscious of it. In Jellinek, who is more positivistic than Duguit in this connection, this problem does not arise.

There can be no doubt that Duguit's position resulted, by his own admission, from the influences of French positive sociology. The entire bent of Duguit's thinking is due in large measure to his relationship with the positivistic school in France. His motif is positivism, realism, science. He objects to the metaphysics of personification and the scholasticism of interpretation with which the old theories are interwoven. He cites St. Simon[33] and Auguste Comte[34] with approbation. The identification of sovereignty with the metaphysical, the nonpositive, and the nonscientific is an important factor in his appeal for its discard.[35]

It was this identification of sovereignty with the metaphysical that played its part in making Duguit desirous of ridding himself of the very term. It was because he was looking backward, at the significance of the term in the past, that he wished

[33] *Du régime industriel in* Duguit, *Traité du droit constitutionnel*, p. 438.
[34] *Système de politique positive*, IV, Appendix, 103.
[35] Cf. his indictment of Le Fur, Esmein, Hauriou, etc., for using scholastic terms like "substance" and "attributes" (*Traité du droit constitutionnel*, p. 476).

to cashier it. It had served its purpose in the conflict against the absolutism of the monarchs when it was shifted from God and the monarchs to the people. That conflict is over; let the term go. To this point his attitude is similar to that of Preuss. On historical grounds the term has outlived its usefulness.[36]

It would be far from correct to imply that the basis of his antagonism to the theory of sovereignty was solely this purely psychological one. The events of his lifetime confirmed and intensified his reaction. Federalism and decentralization were early elements which served factually to vindicate his objections to a unified seat of unconditioned commanding authority. Syndicalism and internationalism served even more to reinforce his contentions. The World War, too, served its purpose. It enabled him to combine patriotism with jurisprudence, because antagonism to sovereignty could be translated into an antagonism against a theory of German absolutism and arbitrariness. From these additional practical sources, then, the juristic theoretician found additional confirmation for his rejection of the old concept of sovereignty. And from the additional public services which the French state had to assume in the wake of the war, he found even more confirmation for his positive structure.

Syndicalism appeared as a force of which Duguit was sufficiently conscious to seek to integrate it in his system as early as 1908.[37] It is the most important, the most characteristic fact of our epoch. Not the aggressive violence of syndicalism is its important or even characteristic element, but the movement of individuals to combine into groups on the basis of common interests, social and economic, and the tendency to give these groups a definite place in the juridical order—that is its sig-

[36] Cf. Hugo Preuss, *Gemeinde, Staat, und Reich als Gebietskörperschaften* (Berlin: J. Springer, 1889).

[37] Duguit, *Traité du droit constitutionnel*, p. 439.

nificant aspect.[38] Syndicalism is a force parallel with the older political force of organized individual citizens in French national life—to speak of his native country—and therefore Duguit thinks that both ought to be recognized.[39] The implications of syndicalism for theory of sovereignty are obvious and unavoidable. They put it outside of the realm of the factual. Thus syndicalism bears down on the old theory of sovereignty.[40]

Internationalism, too, lends additional weight to his construction. The existence of international, moral, economic, and political relationships is an undoubted fact. These prove the existence of an international law underlying them. The conventional French juristic theory, accepting the theory of state personality and state sovereignty, deduced international law for the autonomous states as it deduced law for the autonomous individuals. Just as individual rights are inherent and absolute, yet subject to the necessity of being exercised without interfering with the rights of others, so states have the rights of sovereignty subject to the condition that their exercise does not interfere with the sovereignty of other states. The German theory deduces international law as it deduced internal law. It is the result of the state's unilateral assumption of limitations. Duguit refuses both constructions. The answer

[38] *Ibid.*, p. 508.

[39] "Si l'on veut que le parlement soit l'exact représentation du pays il faut qu'il soit composé de deux chambres, dont l'une représentera plus particulairement les individus (la chambre des deputies) et le dont l'autre (le sénat) représentera plus particularement les groups sociaux, suivant un système que l'art politique saura déterminer pour chaque pays" (Duguit, *Manuel de droit constitutionnel*, p. 167).

[40] "J'estime qu'on est tout à fait en dehors de la verité sociale quand on parle encore de la souveraineté nationale à la manière traditionelle conçue comme la souveraineté de la majorité numerique des individus. A côté de la puissance du nombre, s'est dressé une autre puissance sociale, celles des groupements syndicaux" (Duguit, *Traité*, p. 511, cf. Duguit, *Manuel*, p. 62).

to the question of how is international law possible without a superior authority to impose and execute it as given by the advocates of the older formula appears very similar, if not the same as his own; it involves the statement that the real sanction of international law, as of any law, is psychological. He sees that even Jellinek posits international law as a true law. Yet he refuses to deviate from his conception of international law as the juridical expression of the intersocial norm which is applicable to individuals only, not to groups, and which finds its justification and sanction in the consciousness of solidarity of the various individuals of the various groups. In response to the question of what will enforce the sanction, since there is no superior, Duguit gives an interesting response which shows how similar his answer is to that of his opponents. He says that not the existence of an organized sanction with coercive ability is necessary; but the consciousness of the necessity for such a coercive sanction is sufficient to make international social norms law. How close this is to Jellinek's guaranties as the necessary element of international law needs no further comment.

CHAPTER V

PURE JURISPRUDENCE AND INTERNATIONAL LAW—KELSEN

ESMEIN identified the state with the nation; Jellinek, with organized society or the community. Their approach engendered the juristic problems of the relation of one community to another, whether in a federation or in the general sphere of international relations. It led to the necessity of defining status; when is a state a state? It led to the problem of determining state characteristics; what powers characterize a state? how much power? under what conditions and to what purposes? Its difficulties led to the redefinition of sovereignty as ownership of power or as the right of auto-limitation; to the lack of emphasis on international law; or to the jettisoning of the essential unity which must characterize jurisprudence as a science, as a single system of explaining related data. It led to a hypostatizing of the nation or the society and to the subsequent problems of relationships between what did not exist, between created fictions which it considered real.

Hans Kelsen entered upon the problem of sovereignty as a pure jurist, as one who refused to permit personifications to sidetrack him from the realities with which he dealt. A pure science, according to Kant, must have a content and a methodology proper exclusively to itself. Therefore, Kelsen is concerned only with principles of law, not at all with the realities of social life. His science deals, it is true, with law and the state and sovereignty, but it is a normative one. It has its own method, unifying principle, and sphere and source of validity. Kelsen's desire to purify his science, his jurisprudence, makes him survey the political thinking of his con-

temporaries critically, with the intention of divesting their theories of whatever admixtures of political or historical or other infiltrations they might possess. Juristic logic alone ought to reign in the sphere of pure jurisprudence. The reason for the anarchy of method and meaning in the most crucial of political theories—that of sovereignty—is the fact that it has always been involved in political as well as in scientific considerations.[1] The political implications of the original doctrine itself, of the doctrine of Bodin, are patent to all who know it.[2] Yet alongside the political, throughout the entire history of the theory, runs a juristic element. "Were it not," Kelsen reasons, "for this juristic element, the concept of sovereignty would not have succeeded in remaining the iron basis of political and legal science."[3] And Kelsen's interest lies in determining the nature of this element.

The past history of the concept, however, is no justification for eliminating sovereignty from modern legal and political doctrine, simply because one of its older, earlier meanings no longer accords with facts as they are today.[4] Its more modern meanings, moreover, come much closer to sovereignty's real meaning and are therefore useful for political and juristic doctrine. Instead of discarding the term, then, it would be more advantageous for modern jurisprudence to discern its

[1] Hans Kelsen, *Das Probleme der Souveränität und die Theorie des Völkerrechts* (Tübingen: J. C. B. Mohr, 1920), p. 1.

[2] Kelsen cites Haenke's *Bodin* (1894) and Landmann's *Der Souveränitäts Begriff bei den französischen Theoretikern, von Jean Bodin bis auf Jean Jacques Rousseau* (1890); cf. Paul Janet, *Histoire de la science politique dans ses rapports avec le morale* (Paris: F. Alcan, 1913).

[3] Kelsen, *op. cit.*, p. 2.

[4] This argument against the historical reasons for discarding sovereignty is directed by Kelsen against Hugo Preuss, who in his *Gemeinde, Staat, und Reich als Gebietskörperschaften* (Berlin: J. Springer, 1889) advanced the argument that absolute unlimited state force is incompatible with the modern legal state, and that therefore sovereignty should be relegated to the historical past whence it sprung. Note how this approach parallels Jellinek's, above, in Chap. III on Jellinek.

actual meaning and to employ it accurately as a technical term. To deny the concept because of its past meanings is to be blind to its modern meanings.[5] The thing to do is to discern, through all the manifold meanings of the term in the course of its history, that kernel of meaning which has remained constant throughout.[6] The historical argument attempts to show that the Greeks and the Romans had no conception of sovereignty, and that therefore sovereignty is a historical concept with no permanent validity. Kelsen answers this argument cogently. Because it was recognized late by juristic and political science does not make it any the less true. Now that we have recognized it, it is as valid for ancient Egypt as for modern Europe. Past variations in the meaning of the concept are beginning to be stabilized. Sovereignty is attributed now almost exclusively to the state as its subject (after having been considered an attribute of the prince, or the people).[7] In addition to the state as subject, one other element has also remained constant—the characterization of the subject of sovereignty as the highest, the most superior.[8]

These, then, are two constants which must persist in the meaning of the concept: its relevance to the state and its character as an attribute of the Most High. But this idea of most high, of highest, must not be conceived of as a spatial relation. It is not. When the concept is used in reference to human relationships, it might mean two things. It might mean, first, the causal element in cause-and-effect relationship, that is, it might refer to the motivating force where one will dominates the other. It would, however, be impossible to find such a causal element which should be the most high, completely independent of any other human will. For there is no will

[5] Kelsen, *op. cit.*, p. 3.
[6] *Ibid.*, p. 4.
[7] *Ibid.*, p. 5.
[8] *Ibid.*

free from all social, economic, and legal obligations.[9] Or, second, it might mean a description, not of actual relationships, but of relationships in the sphere of *Sollen*. It might refer to the position of one to whom another is "obligated" to respond. This obligation is not a subordination to any person; it is a subordination to the norm; a subordination, an obligation which may be delegated to a person, if the norm demands it; but only the norm is the ruler, and "sovereign" only in so far as it is considered the highest.[10] To repeat, however, highest does not mean a position in a spatial relationship. It has reference to a definite logical qualification, since we are in the realm of the juristic. It means that the norm is conceived as a "not-further-deducible one," as logically original. Moreover, the norm's obligatory character is by no means psychological, for that would reintroduce a nonjuristic element into Kelsen's system.[11]

Nonjuristic elements have no place in jurisprudence. The insistence on this makes Kelsen unable to accept the division which we have already seen in Jellinek—a division which enables the latter to conceive of two phases of the state, one sociological and physical, the other purely juristic and legal. Kelsen insists that "the matter of a science is determined by that science"; that it is not correct to call two different things by the same name. In the sphere of jurisprudence, the state is law, the state is the legal organization, or, to use still a third phrase, the legal order (*die Rechtsordnung*).[12] All the physical properties which are traditionally attributed to what is elsewhere called "state" are totally irrelevant to this juristic concept; as irrelevant as physiological and psychological con-

[9] *Ibid.*, p. 7.
[10] *Ibid.*, p. 8.
[11] *Ibid.*, pp. 9–10 n.
[12] *Ibid.*, Chap. II, *passim*.

siderations from the harmony of a symphony. The legal relations of a society and they, alone, are the state.[13]

Now, when jurisprudence considers a state as sovereign, when it ascribes sovereignty to the state, this too is not physical description of power, but a qualification of a legal order. When sovereignty is ascribed to a state, it indicates that the state, the legal order, is being conceived of in its totality. It means that the quality of most high, of not-being-further-deducible, or, as we might say, of being the ultimate origin, is ascribed to it.[14] What such a conception implies for the problem of sovereignty or for the status of sovereign and non-sovereign states in a federation will become clear as the theory is elaborated. The existence of sovereignty cannot be determined by going beyond the sphere of jurisprudence, by searching for objectively valid facts; it must be determined by an investigation of the conditions under which individuals and governments act *as if* sovereignty were existent, *as if* sovereignty were given.[15] The nature of these conditions in actual reality is no concern of the jurist; their truth is irrelevant for him. As a jurist, they are the materials he works with. Concepts and reasons which are current as explaining the attribution of sovereignty to the state are the elements he utilizes and

[13] *Ibid.*, esp. pp. 11–12.

[14] "Sovereign is only that order which is not comprehended in any other, because not deduced from any other order; that is, only that comprehensive order is sovereign which encompasses all other orders as partial orders; is the state, only when it coincides with the comprehensive total legal order" (*ibid.*, p. 13).

[15] "Because sovereignty is not and cannot be a fact of the external social world, but only an assumption of the spectator, a concept of evaluation, the question of when sovereignty is given means: 1. what are the psychological conditions under which I, the observer, make the legal, logical assumption of sovereignty, and 2. what are the psychic and other (e.g., economic, religious, political, though always only the social-psychologically active) reasons which lead to a mass conception of sovereignty, to the fact that even the members of a people, or even a definite group of the same people, operate with its political system as if with a highest, not-further-deducible one" (*ibid.*, p. 15).

analyzes in order to build and clarify his science.[16] All of which is another way of saying that Kelsen's method is to deduce his system by purifying and clarifying those juristic theories already present and accepted, rather than by building his theory on the basis of social facts, as Esmein, Duguit, or Laski do.

So Kelsen begins by investigating the theory of the legally bound state person, of which Jellinek's theory might be taken as typical. His investigation here shows him that the state is identical with law. To consider the state as a person is simply to personify for convenience. To go beyond that personification, and to speak of the state as "bound" by its own law by rights and duties, is immediately to go too far. For the state *is* law, and "when a subject of rights and duties is posited, what is posited is that certain duties and rights exist in a unified system.[17] Auto-limitation of states is not only confusing, but its problems are truly illusionary, due primarily to personification which has been carried too far. Legal personality, also, is permissible for the state, because the juristic person is only a personification of the norms relating to individuals or group conduct. It is a personality lent by the law to a part of itself. It implies that the state has permitted something which derives from the legal order. But the totality of the legal order—which is what the state is—cannot derive juristically from anything else, and it is therefore incorrect to speak of the state as a legal person. The state is the legal order.[18]

Modern jurists have approximated the realization of this. Krabbe, for example, has come as close as any legalist to the

[16] *Ibid.*, pp. 15 ff.

[17] *Ibid.*, p. 18.

[18] Kelsen draws the parallelism between jurisprudence and theology here. Catholicism created God the Father and limited his omnipotent power by God and Son; jurisprudence created the subjective state with its sovereignty and then limited it by objective law and rights (*ibid.*, p. 21).

realization of the congruence of law and state. In modern times he identifies the two. Because he sees this identification as the result of a historical process, however, he commits the error of considering the state originally as something apart and distinct from law. Thus Krabbe can see legal sovereignty as an attribute only of the modern constitutional state, but not of the old absolute monarchy where force was centered in a personal authority.[19] He persists in visualizing the state and law as two distinct entities whose identification in the present is the result of historical evolution, and whose validity therefore is historically conditioned. For Kelsen, on the other hand, sovereignty of the law, which is sovereignty of the state, is, once achieved, a concept of validity for all political order. It is as true of the absolute monarchy as of the democratic republic. It simply indicates the supremeness of the legal order; the actual form of that legal order is not pertinent to the discussion.[20]

In the older theories the failure to recognize the identity of state and law resulted in conceiving the state as a power above law. Such a power, however, is juristically irrelevant since it is beyond the legal sphere.

Jellinek, as we have seen, has emphasized the formal character of sovereignty most among recent theoreticians.[21] He recognized and emphasized the fact that the attempts to give it a definite content identified it with state force or with the legal system.[22] He showed that those who discuss the content of sovereignty really are concerned with its functions, with the powers of state force. Yet, unfortunately, Jellinek himself

[19] Cf. Hugo Krabbe, *Lehre der Rechtssouveränität* (Gröningen: J. B. Wolters, 1906).
[20] Cf. Kelsen, *op. cit.*, sec. 7.
[21] *Ibid.*, p. 40.
[22] Georg Jellinek, *Recht des modernen Staates: Allgemeine Staatslehre* (Berlin: O. Haring, 1900), pp. 475 ff.

falls into the error of identifying sovereignty with one function of state force, with the so-called "constitutive" power. Sovereignty has three characteristics: supremacy, independence, and "the ability of exclusive auto-limitation through the setting up of a legal order."[23] This ability of exclusive auto-limitation is, however, only one attribute of state power. It is not at all essential to the concept of state or sovereignty. A legal system can be conceived of as the highest, as sovereign, without the exclusive capacity of auto-limitation or of auto-determination. In fact, a legal system needs no constitutive power; actually it can change only when provision for its change is already expressly incorporated in the legal system itself. Otherwise there is no legal possibility of revision or amendment. Nevertheless, it is still a legal system even without such possibility. To identify sovereignty with auto-limitation, then, is to confuse it as a legal concept with one aspect of state power.

This attempt to free jurisprudence from confusion leads Kelsen to deny the entire argument of traditional German jurisprudence concerning the problem of the *Bundesstaat* and its members. The attribution of statehood to the members because they were historically once states and are so-called even today is an argument from facts obviously unrelated to jurisprudence—from "vulgar linguistic usage" which should have been rather purged by science than permitted to contaminate it. To call the member-states "nonsovereign" states is juristically inaccurate. And eventually the attempt to define the state apart from sovereignty leads, nevertheless, to the definition of a sovereign order of coercion.[24]

Taking Jellinek as typical of the attempt to conceive of a state as distinct from sovereignty, we have his definition of

[23] Kelsen, *op. cit.*, p. 42.
[24] *Ibid.*, p. 55.

the state as original, dominating force, as dominating force through own power, and therefore through own law.[25] Immediately, Kelsen raises the question whether it is possible to conceive of power as translatable into law; and, if so, what can the *Macht zu eigenem Rechte* mean other than the sovereign legal system. He cannot conceive of the member-states as free and independent, in spite of Jellinek's insistence that they are so within their spheres, so long as their sphere is determined by the *Bundesstaat*—a fact which Jellinek admits.[26] How can they be free if limited, or independent if subject to a superior order in the extent of their powers? Limited freedom is impossible, as is limited sovereignty. There may be practical freedom to determine how the powers permitted shall be exercised, but formally the member-state is bound to the sphere delimited for it.[27] Or, if limited sovereignty be possible, why is divided sovereignty, i.e., limited sovereignty, any the less possible? Why should Laband and Jellinek, among others, object to Waitz's concept, if freedom or independence can be partial? They object, of course, because they have personified the state; and a person cannot be limited at any point and still be considered free and independent, sovereign.

Again Kelsen sees this personification, this confusion of jurisprudence with metajurisprudence, as the reason for the contradiction in their thinking. For him, a member of the *Bundesstaat* is no state, is neither free nor independent nor sovereign.[28] It is a partial legal order belonging to the larger

[25] Jellinek, *op. cit.*, pp. 489–90

[26] "Der Bundesstaat durch seine Verfasung die Gliedstaaten schaft" (Jellinek, *Die Lehre von den Staatenverbindungen* [Wien: 1882]).

[27] Kelsen, *op. cit.*, p. 61.

[28] When a state is incorporated into the Reich, it is logically a process of the state's accepting its legal organization as part of the general legal organization of the whole. It, per se, ceases to exist. Its organs become indirect organs of the whole legal system, and all its functions and will (i.e., all

legal order. Again he stresses legal order, this time to the exclusion of the spatial element and in order to invalidate the theory advanced by Fricker[29] and by Preuss[30] of *Gebietshoheit* as the mark of the state. Jellinek too subscribes to the notion that the state rules exclusively in its territory. "On one and the same territory, only one state can exercise power."[31] Kelsen insists that this idea is due to the physicalizing, the materializing of the state, in order to make it impermeable. He queries: Did not both American and German troops exercise their power in French territory during the war?[32] The exclusiveness which the state possesses is derived really from the unity of the legal order, from the fact that any individual is exclusively directed in his conduct by one order, and one order only. Territory is certainly not an essential element in the conception, juristically. The exclusiveness comes from the unity, from the sovereignty of the legal order.[33]

The insistence on a purely legal theory leads to a denial of purpose as the essential criterion of the state (contra Ihering), for to subordinate a state to some purpose is to subordinate it to a nonjuristic system, to destroy its independence, and make it part of something else. That the state is its own purpose, or that it has no purpose, is really a statement of the fact that

its legislation and governing bodies) are ultimately attributable to the general organization which encompasses it.

[29] Karl Victor Fricker, "Gebiet und Gebietshoheit," *Festgaben für Albert Schaffle* (Tübingen: H. Laupp, 1901).

[30] *Op. cit.*

[31] Jellinek, *Allgemeine Staatslehre.*

[32] Kelsen, *op. cit.*, p. 74.

[33] Preuss's *Gebietshoheit* is in truth competence-*Hoheit* and silently implies sovereignty (*ibid.*, pp. 75 and 81); cf. Charles E. Merriam's view, in *History of Sovereignty since Rousseau* (New York: Columbia University Press, 1900); also cf. Radnitzki's view in his *Die rechtliche Natur des Staatsgebietes* that *Gebietshoheit* is really sovereignty.

"the state alone is a highest, final order, a highest final purpose, a superior value, the state is sovereign."[34]

When Kelsen comes to investigate the concept that law is positive, he reaches a similar conclusion. Positivism of law, correctly construed, means the independence of law as against other systems of norms—moral, political, or economic. It is nothing else but the sovereignty of the legal system. It does not mean, as the newer literature would have it, the "effectiveness of the law in society." Any such reference back to social reality and fact has no place in a system of norms, in a normological science. Law as fact is a consideration for a sociological investigation. It might have its place in a legal sociology, if such a thing is possible.[35] Positiveness of law is dependent upon the relation of a law to the legal order, not to the social order. It depends upon the manner of legislation, for instance, or upon the manner of promulgation. Its setting in the social order is a nonjuristic consideration. We should not confuse legal positivism with the social or the moral or the customary. Legality depends on the constitution, on the original legal norm, which takes the form of the proposition: one *should* conduct one's self in a given manner because one *should* listen to the source of the given command.

> Not because God, conscience or reason command, should I conduct myself so and so, but because *I should* listen to the command of God, conscience, or reason; this is the final, not-further-derivable basis for the validity of religion or morality. Only as the command of a superior norm can God, conscience, or reason justify the oughtness of a definite norm.[36]

This emphasis on the "should," on the "obligation," which is fundamental to the juristic order, results from Kelsen's

[34] Kelsen, *op. cit.*, p. 84.
[35] *Ibid.*, p. 92.
[36] *Ibid.*, p. 95.

division of reality into *Sein* and *Sollen* and from his feeling that this "oughtness" in the realm of the *Sollen* is an ultimate beyond which analysis need not go. It leaves him open to challenge, however, as to whence and wherefore this ultimate, and whether it is not possible to analyze it still further? What entitles this "superior norm" to its position of superiority? What gives it its character of *Ursprunglichkeit?* For, in truth, to say that "I should conduct myself so and so .... because *I should* listen to the command of God, conscience, or reason" is really to point to obedience as a virtue in itself; it is to set obedience as the "not-further-derivable basis for the validity of religion or morality."

Such an analysis, when due allowance is made for the difference in verbiage between the German Neo-Kantian and the English utilitarian, shows a basic similarity in the ethical foundations of both Kelsen and Austin. John Austin also bases the state, albeit more simply, upon the "habit of obedience" of the bulk of a given community. For him, too, the ultimate of political reference, supplemented, of course, by other qualifications, is obedience.[37]

But Kelsen's view of obligation abstracts from it any element of coercion, even of psychological force. It removes as well any parallelism between the obligatory character of the command and social reality. This leaves Kelsen himself the question: How do we determine whether the obligation is effective? And does the effectiveness of such an obligation bear any relationship at all to social reality?[38] Juristically Kelsen is forced to answer no. Outside of jurisprudence, however, there

[37] *Lectures on Jurisprudence* (London: 1873). "If a determinate human superior not in the habit of obedience to a like superior receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society, including the superior, is a society political and independent."

[38] Kelsen, *op. cit.*, p. 96.

is a principle, a rule of logic, which demands the simplest explanation possible for phenomena—the principle of economy of recognition.[39] The justification of a legal order actually will depend, then, upon its ability to explain most simply relationships in social fact.

Because of the monism of his system and the desire for the most simple principles of law, Kelsen investigates the problem of sovereignty, not only in the sphere of municipal law, but in the sphere of international law as well. The question here is whether or not municipal law and international law are two distinct systems or one and the same. Is international law law at all? If it is, what is its relationship to municipal law? Does it derive from municipal law? Does it stand completely independent of it? Does it encompass municipal law? Or do it and municipal law form part of one single, higher order which encompasses both?[40]

According to some theorists, there is only one public law—state law.[41] There is no international law from the juristic point of view of municipal theory; at the best it is positive morality (Austin), or external public law (Esmein). On the other hand, some theorists[42] posit the dualism of international

[39] *Ibid.*, pp. 98 ff.

[40] *Ibid.*, pp. 102 ff.

[41] In relation to the subsequent discussion see the next chapter on "International Law."

[42] Primarily, Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: Hirschfeld Co., 1899). The classic modern exponent of the dualistic construction of law on the Continent is Triepel. Upon *Völkerrecht und Landesrecht* is based the whole subsequent discussion of the relationship of international to state law. It makes a complete division and separation of the two; cf. Gustav Adolf Walz, *Völkerrecht und Staatlichesrecht: Untersuchungen über die Einwirkungen des Völkerrechts auf das innerstaatliche Recht* (Stuttgart: 1933). Walz dedicates the work to Triepel and presents his position in a critical study of the relations and influences of international law on municipal law. Triepel sets up, as the basis of law in state—law, the will of the state, whereas in international law, the basis of law is the *Vereinbarung* which, translated, is "union, collaboration." The essential difference

and municipal law. They consider both as distinct yet valid legal systems. One deals with individuals and their relationships; the other deals with states and their relationships. The two systems should have no possibility of conflicting because they not only come from different sources but they deal with different objects. This dualistic construction Kelsen refuses to accept.[43] He insists in his analysis of its logic that, even if we consider international law as coming from a different source than municipal law, the possibility is in no wise precluded of both having the same object, with a consequent possibility of conflict.[44] He protests against the conception that there is a difference in the objects of public law and private law; that municipal and international law deal with different objects—the one, with persons, the other, with states.[45] So far as he can see, from his own point of view, a legal system is concerned with ordering legal relationships.[46] A state is simply one of these relationships in public law; it is no better and no more of a "person," legally, than the body of norms which envelops

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between his position and that of Jellinek, who also sees international law as based on the collective acquiescence of states, is that he insists on the binding force of a rule of international law due to such a *Vereinbarung* which makes it impossible for a single state to withdraw from such a rule because of its sole will, whereas for Jellinek such a withdrawal is possible; cf. Triepel, *Droit international et droit interne*, French transl. of *Völkerrecht* (Oxford: 1920), p. 79 n. Triepel's position would seem to lead to a *civitas maxima*, acording to Jellinek, since it would subordinate the state to an external coercive will. But Triepel does not see it so. His dualistic system is followed in Italy by the Italian professor Anzilotti in his *Teoria generale delle responsabilita dello stato nel diritto internazionale* (1902) and in his *Corso de diritto internazionale* (1923–25); see the discussion of Triepel in Wiktor Sukiennicki, *La Souveraineté des etats en droit international modern* (Paris: 1927), secs. 100 ff., pp. 211 ff.

[43] Although he had wavered on the question in his *Hauptprobleme?*

[44] Kelsen, *op. cit.*, p. 124.

[45] He acknowledges Krabbe's contribution to this point of view in the *Lehre des Rechtssouveränität*. So far as he can see, from his own point of view, a legal system is concerned with ordering legal relationships (*ibid.*, p. 30).

[46] *Ibid.*, p. 125.

the human individual. The state person is equal but not superior to any other legal person. This means that it is inaccurate to differentiate municipal and international law on the basis of the material they deal with, on the basis of the subjects whose relationships they order.[47] It means that it is impossible to conceive of the two systems of law as independent of each other.[48]

International law as simply external public law which obligates only the state, but neither its organs nor its people, is equally impossible to Kelsen. International law will find very little to bind if both organs and people are abstracted from the state; for what is the state apart from its organs and people? The old theory considers the state bound by its treaties which later become effective within the state when the state of its own volition, and from its own law as a base, legislates in conformity with the stipulations of the treaty. Kelsen finds himself almost completely in accord with Krabbe in insisting that the subjects of international law are not the states but the individual persons.[49] The laws which the state organs pass because of international agreements are not municipal laws getting their validity from the municipal law but true international law. In legislating such statutes, the legislature, and in executing them, the executive, are not organs of the municipal legal order but of the international legal order. This

[47] *Ibid.*, pp. 126 ff.

[48] Kelsen explores the difficulties involved in the principle of recognition in the older doctrines of Triepel and Heilborn. Recognition serves to relate international law to municipal law as subordinate to it, since international law depends for its validity on recognition. But if validity hinges on recognition, how can conflict, which they admit as possible, ever arise between the two systems? How does recognition square at all with a dualistic construction which seeks to view both systems as co-ordinate equals? How can international law be a "power" over the states when its validity and force come actually from state auto-limitation? (*ibid.*, sec. 33, pp. 134 ff.).

[49] *Ibid.*, pp. 275–76, to the effect that international law applies to persons but not to the state.

alone leads us to the recognition that, actually, the entire world is one legal system, one world-order.[50]

There is a world legal order which is not at all anarchistic simply because the form it takes is not the same as the structural form of a modern state. Neither *Herrscher* nor legislator is necessary for law; as witness, law operates in societies governed by customary social law; as witness, the private-law institution of self-help which, in some societies, is the only sanction. Even war is not an indication of anarchy, a proof of the lack of a world-order; on the contrary, war, too, is within the international legal system; is regulated and recognized as a means of determining legal problems otherwise not solvable. It is a legal method of state self-help.

This is the point of view of the primacy of international law. Opposed to it is the doctrine of the primacy of municipal law. Kelsen recognizes the logical validity of both systems, once their original postulates are granted. The problem is how to choose between them. What are their implications and on the basis of what should choice be made?

Logically both are valid and contending for survival in modern jurisprudence. But we must realize that each is simply a reflection of a larger philosophic attitude, of a much more comprehensive Weltanschauung. Our acceptance or rejection of the conceptions will depend upon our sympathies with the larger philosophic, as well as with the practical, implications of the theories. The doctrine of the primacy of municipal law is closely bound up—in fact, it derives from—the philosophic outlook which is purely subjective, which begins to view the world from the point of view of the individual *I*, from the ego or the self. Obviously, it can see no self as equal to its self; no *I* can be similar to its own *I*. Similarly, the state, once it is

[50] Kelsen traces this idea back to Christian Wolff and Kaltenborn, who are the first to urge the primacy of international law (*ibid.*, p. 241).

accepted as the starting point, can recognize no state as equal to its self, no sovereignty as comparable with its own. Whatever international law there may be is due to its recognition and deriving from its will. This is an unavoidable consequence of the subjective philosophic outlook.[51]

The primacy of international law, on the contrary, is the result of an objectivistic outlook. It attempts to reach the self, the ego, the *I*, by beginning from the world. It starts by positing a world-reason, a world-spirit. It recognizes that the individual *I* is only an ephemeral apparition which is only a part of the universal self, subject to and deriving from it. In such a conception the state, too, becomes part of the larger international community, and its law becomes part of the whole. State sovereignty disappears, and law needs no basis in any such concept as recognition. Law is the primary element, the universal, the real.

Kelsen sees the logic of the subjectivistic outlook leading eventually to the denial and negation of all law. For, if there is no law between states in the international sphere, there should, if we carry the analogy through, be no law between individuals in the state sphere, and therefore neither law nor science of law.

As to the practical implications of the two theories, Kelsen sees a direct relationship between the subjective conception (which supports state sovereignty) and imperialism. State sovereignty and imperialism are twins. And imperialism is, in the international sphere, what anarchism is in the state. On the other hand, objectivism and the primacy of international law are directly related to pacifism.

At present both conceptions are competing for dominance in jurisprudence. International law is wavering between them. Kelsen thinks that the primacy of international law will even-

[51] *Ibid.*, p. 317.

tually emerge victorious. Even as the concept of state law survived the individualistic doctrines originating in natural-law contract and the idea of individual human sovereignty, so the superstate and its international law, the *civitas maxima*, will survive the individual states. The concept of sovereignty must be completely suppressed. And the goal and aim of all political action must be toward that end.[52] Thus does Kelsen, the man, forsake his juristic garb, to become at the end the politician and ethical moralist who has chosen between logically complete systems on the basis of their moral value and implications.

Kelsen's juristic elaborations are, from the nature of his scientific method, almost completely divorced from any entanglements with general philosophy. Only when Kelsen evaluates juristic systems from a consciously recognized meta-juristic position do we get an indication of his leanings toward universalism and pacifism. Kelsen's jurisprudence, however, as he himself recognizes, is also more congenial toward certain sociological, psychological *Anschauungen* than toward others. The state is a social group like all social groups, although, of course, it is the most significant of them all. It is "the specific unity of a multitude of individuals, or at any rate of individual activities." The nature of that unity is the essence of any inquiry into the nature of the state.

If we conceive of the state as society, as an "empiric, causal, sociological unity," a unity which exists "where several individuals act reciprocally" (as Simmel defines it), we assume what is essentially a fiction, because the legal unity of the state does not coincide with the sociological society.[53] It is inaccurate, also, for it overemphasizes the associative aspect

[52] *Ibid.*, p. 319.
[53] *International Journal of Psychoanalysis*, V (London), 5.

of society, its unity, whereas in truth social interaction may be disintegrative as well as associative.

The unity we are concerned with is exclusively psychic, so that any ascription of spatial relationships to such is simply figurative.[54] We must recognize that there is no bond "between" individuals, but that the bond of each individual is within himself,[55] irrespective of the influence of the other individuals with whom he is in relation. And, within him, it fluctuates in strength and intensity depending upon a variety of conditions.

To view the state as a result of psychic parallelisms in a group is inaccurate, therefore, because the degree of parallelism psychically (the commonness of individual wills) will fluctuate, will vary with given times and circumstances. Similarly, it is inaccurate to consider the state as a single domination relationship. Unity exists as little among the rulers as among the ruled. Therefore, if we are desirous of an adequate psychological substructure for our ideas of the state, of unified society, the German concept of *Herrschaft* and the French idea of *collaboration* are both ruled out.

There is, however, a third possible form of social unity, which views its bond as purely within the individual, "intra-individual." This is the approach of Sigmund Freud, Kelsen's fellow-townsman of Vienna, with which Kelsen declares himself in substantial agreement. Freud suggests that groups are the result of identifying one individual ego ideal with another and making the common ego ideal the libidinal object cathexis

[54] *Ibid.*

[55] "As a psychic fact union is an idea or feeling in A's mind who knows or feels himself bound to B. . . . . If society is a psychic phenomenon then this bond which we call society is complete within each individual. To assert that A is connected with B is merely hypostatizing an entirely intra-individual relation erroneously transposed into the external physical world" (Kelsen, *op. cit.*, p. 6).

of all.[56] But the state cannot, according to Kelsen, be seen as a group of individuals, who have identified themselves with one and the same ego ideal, because

> the psychic mechanism of identification presupposes that the individual must perceive an analogy with the other with whom he identifies himself. One cannot identify oneself with an unknown person of whom one has never been aware, nor with an indeterminate number of individuals. Identification is restricted from the first to quite a limited number of people who are aware of one another and therefore—quite apart from any other objections—it is unavailable for a psychological characterization of the state.[57]

The cogency of this argument might readily be challenged. It may be true that one must perceive an analogy with another in order to identify one's self with him. It does not follow therefrom that one cannot identify with a person of whom, individually, one has never been aware, or that one cannot identify with an indeterminate number of individuals, if all of these have in common the same analogous characteristics.

The argument confirms Kelsen's belief in the position which he had attained independently in his *Jurisprudence*. The state is not a group but an idea.[58] As such it is uniform and continuous, fixed and permanent, and clearly defined. As such, therefore, it is clearly irreconcilable with "the fluctuating, wavering, constantly intermittent, now expanding, now contracting, reality of those psychic groups—phenomena under which a psychological scientific theory vainly endeavors to subsume these social institutions. . . . ."[59]

[56] Sigmund Freud, *Group Psychology and Egoanalysis*, trans. James Strachey (Vienna: International Psychoanalytical Press, 1922).

[57] Kelsen, *op. cit.*, p. 22.

[58] "Only the state, precisely, is not one of the numerous transient groups of very variable extent and libidinal structure, but is the guiding idea, which the individuals belonging to the variable groups have put in place of their ego-ideal in order thereby to be able to identify themselves with one another" (*ibid.*, p. 23).

[59] *Ibid.*, p. 26.

On the basis of this type of reasoning Kelsen subjects the sociology of the Durkheim school to a severe attack which reveals, at the same time, Kelsen's reaction to Duguit's *Sociological Jurisprudence*.[60] In the main, the argument against Durkheim is based upon the objection to the hypostatization of society and the assumption of validity for a given system of norms.[61] The same argument would hold against Duguit, who follows him.

In order to avoid the fallacies of the other systems, Kelsen conceives the state solely as the idea of a code of human conduct. As a sociological fact it does not exist.[62] It is simply a

[60] "The French sociologist, Emile Durkheim, shows a typical example of this method of gliding out of the sphere of psychological causal knowledge into that of ethico-political or juridical considerations. He follows Comte, as he sees sociology as a science of realities. . . . . Durkheim's *méthode sociologique* is simply the application of a naïve substantialistic (that is to say, mythological) point of view to the observation of human behavior under the conditions of reciprocal interaction" (*ibid.*, p. 27).

[61] "And precisely in the case of the state it is apparent that everything Durkheim attempts to express by the assertion of a peculiar psycho-physical objectivity in the external world of the individual is nothing else but the objective validity—assumed somehow—of a specific autonomous intellectual content, the objective validity of a system of norms" (*ibid.*, p. 30).

[62] For a trenchant comment on Kelsen's position here cf. Harold D. Lasswell's *Psychopathology and Politics*, chap. xiii, "The States as a Manifold of Events" (Chicago: University of Chicago Press, 1930). Lasswell quotes Kelsen as follows: "One would be bound to realize that community of will, feeling or thought, as a psychological group manifestation, fluctuates tremendously at different times and places. In the ocean of psychic happenings, such communities may rise like waves in the sea and after a brief space be lost again in an ever-changing ebb and flow" (p. 244).

And this applies to the state as well as to any other community of will; it too may be lost. But Lasswell points out that the concept of the state involves a time dimension of extended length and that in a long-enough time dimension the subjective events recur in a certain frequency, in sufficient frequency to make it a durable empirical fact:

"Thus the State can be treated in what Kelsen speaks of as an 'empirical, psychological' sense. It is a durable empirical fact just so long as a certain frequency of subjective events occurs. If Kelsen agrees that contents of consciousness are 'empirical,' he is bound to see them in a world of duration, and he has no authority to prescribe that the state must refer to subjective events as a 'knife edge instant.'

"The state, then, is a time-space manifold of similar subjective events. Kelsen is incorrect in alleging that the acceptance of the parallelism of

term describing the regulatory ideology of a collectivity.[63] This leads him to the conclusion that, when we really rid ourselves of naïve substantialization, we shall have a politics without a state. And a politics without a state will be a politics without state sovereignty, as that term is understood by traditional jurists.

If it can be shown that the state as conceived by politics and differentiated in contrast to the law, "behind" the law, as the bearer of the law, is just as much a duplicating "substance" productive of pseudo-problems like the "soul" in psychology or "force" in physics, then there will be a politics without a state, just as today there is already a psychology without a soul and without all the pseudo-problems with which rational psychology tormented itself (immortality, for instance, a specific substance problem), and just as there is a physics without forces.[64]

Thus the newer Freudian psychology with its emphasis on individual psychology is implemented by Kelsen as a furthering agent which favors his pure jurisprudence—a jurisprudence which had sought the exclusion of metajuristic concepts because of the requirements of a distinctive methodology. The need for a peculiar methodolgy had stimulated Kelsen in the first instance[65] to exclude any sociological or political or ethical

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psychological phenomena as a fundamental fact destroys the state as a permanent institution.

"Mere parallelism of psychological events does not give us the state; for a distinguishing type of subjective event must be selected, if we are to characterize the state, the family, and other social groups. Kelsen is entirely correct in criticizing those theories of the state which invoke parallelism but neglect to specify the particular 'contents of consciousness,' since not every and any group manifestations formed upon the parallelism of psychic processes is able to constitute that community" (p. 245).

[63] Kelsen, "The Conception of the State and Social Psychology," *International Journal of Psycho-Analysis*, pp. 35 f.

[64] *Ibid.*, p. 36.

[65] Cf. his *Hauptprobleme der Staatsrechtslehre* (Tübingen: 1911), Preface.

data, to restrict himself to the purely logical and ideational. In Freud he found a support, since from the vantage point of Freud's psychology he could negate the sociological and psychological bolsters of the other juristic conceptions. At the same time he found there confirmation for his positive structure in the emphasis on the ideal, the libidinal object cathexis, as the centering point of the manifold of individuals. With Freud he could negate, as we have already mentioned, not only democratic theories of general will, of common parallel psychic experiences, and aristocratic theories of domination, but theories of auto-limitation, whether these be religious or political.[66]

[66] "And Freud's psychological analysis has rendered an inestimable preparatory service precisely in this direction by most effectually resolving into their individual psychological elements the hypostatizations of God, society, and the state, equipped as they are with all the magic of their centuries-old terminology" (Kelsen, "Conception of the State and Social Psychology" *op. cit.*, p. 38).

CHAPTER VI

INTERNATIONAL LAW—DUAL JURISPRUDENCE

THE POSITION of Kelsen[1] in international law typifies the attitude of the so-called "Viennese" school, which seeks a monistic system of law and a single, comprehensive meaning for sovereignty. As a result of the various elements influencing Kelsen—his Kantianism, his insistence on pure jurisprudence, his historical analysis, and his personal biases—Kelsen sets sovereignty up as simply a symbol of the "highest" norm or of the "total legal order" in which the various state systems are only "partial legal orders." He cannot accept the dualism between international and municipal law because the essence of a scientific jurisprudence is its monism, its integration. This uniqueness of the legal order is what the term "sovereignty" means in his system. It has no reference to practical power or to supreme authority or to a delimitation of the competences of the various states. As a political concept, because of its absolute character, it is unjustifiable. As a juristic concept, he retains the word to indicate the supremacy of international law, of the totality of law, of the complete integration of the legal norms in one system and under one norm.

Under the influence of his pupil Verdross, the legal principle of *pacta sunt servanda* became that one norm, became the apex of the monistic legal order.[2] Verdross himself, however, would go beyond Kelsen in the retention of sovereignty in

[1] Hans Kelsen, *Allgemeine Staatslehre* (Berlin: J. Springer, 1925).

[2] Alfredo Verdross, "Règles générales du droit international de la paix," *Recueil des cours, Académie de droit international*, (Paris: 1929), 271–517, esp. 287 ff.; cf. Georges Scelles *Théorie juridique de la révision des traités* (1936), for a criticism of the principle.

international law. He argues that it can profitably be utilized in distinguishing the status of entities even in a monistic legal system. In an article written in 1927, Verdross reviews the meaning of sovereignty in international law.[3] He sees two conceptions current. According to the one, sovereignty is, in its traditional sense, unlimited and implies the omnipotent state, the creator of all law. This is, for him as for Kelsen, a contradiction of the facts of international law and international community. According to the other, sovereignty is a creation of international law itself. It is only a competence which international law confers upon the states and which varies with the developments of international law. As such Verdross thinks the concept could be retained in international law to distinguish between those competences of a community which are immediately subordinated to international law, and those of communities which are not in direct relation with the latter but are subordinate also to a certain state. In other words, he would reserve the term "sovereignty" for what we now call "states" to distinguish them from communities within the state. Sovereignty refers to being directly subordinate to international law. Only states are directly subordinate to international law; therefore, only their competence comes from it directly and only they are entitled to be called "sovereign."[4] The final possessor of "competence-competence" is the international community, however, which is juridically unlimited and stands supreme in the pyramid of temporal authorities. Its limitations are only the rules of humanity and justice. Essentially this Verdrossian development is a re-implementa-

[3] Verdross, "Le fondement du droit international," *loc. cit.*, XVI (1927), 252–323.

[4] ". . . . il est, justifié de réserver le terme souveraineté à la compétence des États sur le base directe du droit des gens" (*ibid.*, p. 319). Note how this agrees in essence with Quincy Wright's definition of sovereignty. Neither Kelsen nor Sukiennicki follows Verdross in giving this relative meaning to sovereignty as the competence of the state.

tion of sovereignty as a useful concept to distinguish between the states and the not-states.

A similar tendency is apparent among the dualist jurists as well. Originally the jurists of international law who saw it as a distinct system were willing to forego the concept. Even Triepel, the founder of modern dualistic legalism, was not at all hesitant to renounce the theory of sovereignty in international law.[5] Positivistic international lawyers, in the main, had regarded sovereignty as meaning independence. Many were, and are, in favor of substituting the latter word in order to avoid the confusion and logical inconsistency connected with the former.[6] Foulke, in his *International Law,* typifies this attitude when he writes:

> The word sovereignty is ambiguous. . . . . We propose to waste no time in chasing shadows, and will therefore discard the word entirely. The word "independence" sufficiently indicates every idea embraced in the use of sovereignty necessary to be known in the study of international law.[7]

L. Oppenheim, in his *International Law,* follows the idea that sovereignty means independence. He is not swayed, however, by the rigorous necessities of logic to condemn the phraseology of international law as to nonsovereign states. For he is too much of a realist, a positivist. Logical consistency must give way to practical conditions.[8]

[5] "Qu'on n'objecte pas qu'un droint international public des Etats est un contradiction avec leur souveraineté. Si tel était le cas, il serait grand temps de procéder à une révision de concept fameux d'une manière encore plus approfondie que ne l'ont fait à l'époque moderne des esprits célèbres" (quoted by W. Sukiennicki, *Souveraineté des états en droit international modern* (Paris· Ed. A. Pedone, 1927), p. 214.

[6] W. W. Willoughby, *The Fundamental Concepts of Public Law* (New York: Macmillan Co., 1924), p. 284.

[7] Roland R. Foulke, *A Treatise on International Law* (Philadelphia: Winston Co., 1920), p. 69.

[8] Oppenheim writes: "Full sovereign states are perfect, not-full sovereign states are imperfect International Persons, for not-full sovereign states are

In his treatise on *Mandates under the League of Nations*, Professor Quincy Wright attempts to preserve the concept of sovereignty in international law as a logical, useful term.[9] Being a dualist who recognizes the essential distinction between municipal and international law, he indicates, nevertheless, the possibility of retaining sovereignty in jurisprudence.[10] Its retention involves the recognition of a dual meaning for the term "sovereignty"; it involves recognizing one meaning for sovereignty in municipal law and quite a distinct one in international law.

Thus from the standpoint of international law, every entity has some sovereignty if it has capacity to establish legal relations with other sovereigns, and full sovereignty if it has capacity to establish normal relations with all other full sovereigns.[11]

In municipal law the term has a different meaning: "From this point of view sovereignty is . . . . the legally unlimited

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for some parts only subjects of international law" (*International Law* [New York: Longmans, Green & Co., 1912], p. 107). "Sovereignty is supreme authority, an authority which is independent of any other earthly authority. . . . " (*ibid.*, p. 109). "It is a fact that sovereignty is a term used without any well recognized meaning except that of supreme authority. Under these circumstances, those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical though abnormal and illogical conditions of affairs . . . ." (*ibid.*, p. 115).

[9] "While showing the unreality of unified political sovereignty, up to date they [Preuss, Krabbe, Duguit, etc.] have been unable to convince the world that juristic sovereignty is an obsolete conception. The state still seems to exist different from subordinate government agencies and other associations and a term is needed to define it" (*Mandates under the League of Nations* [Chicago: University of Chicago Press, 1930], p. 281).

[10] "If sovereignty is to be useful to international law it must be compatible with the existence of that law, but at the same time its characteristic feature of superiority to municipal law must be preserved. Both can be done if the two types of law are recognized as distinct. One has its source in the family of nations and defines the limits of the sovereign's competence; the other has its source in the sovereign's will acting within his *de facto* competence" (*ibid.*, p. 282).

[11] *Ibid.*, p. 283.

capacity to create jural relations."[12] And "thus sovereignty as viewed from the two points of view has different sources and different sanctions and may have inconsistent applications." From the point of view of municipal law, sovereignty is "a unity incapable of division or limitation"; from the point of view of international law it is "susceptible to analysis, division, and limitation." If a state has "ultimate rights in . . . . some subjects, some government, and some territory . . . . correlative to duties of all or of most of the states in the world together with certain associated powers and responsibilities," then it has internal sovereignty.[13] "External sovereignty or status exists insofar as a state can change, by unilateral action, the jural relations of other states, and must be distinguished from internal sovereignty or independence."[14] At present, the powers commonly possessed by states are those of war and peace, of defense, of recognition of new states, of naturalization, of abandoning or acquiring territory, of acting wrongfully and being responsible, of international negotiation, and of resort to available international machinery for the redress of wrongs and for reform of the laws.[15] If any of these is lacking, full sovereignty is impaired. If they exist in fact only, without sanction of international law, then there is an impairment of *political* sovereignty, but not of *legal* sovereignty. Thus Professor Wright makes in international law that distinction between political and legal sovereignty which analytical jurisprudence has long had in municipal law.[16] He goes on to conclude that

> sovereignty in international law is thus a relative term. . . . . The line between a fully sovereign and a partly sovereign state is not

[12] *Ibid.*, p. 284.
[13] *Ibid.*, p. 289.
[14] *Ibid.*, p. 291.
[15] *Ibid.*, p. 293.
[16] Cf. Ritchie, who early made the distinction, and Esmein, Willoughby, Leacock, etc.

precise and is continually changing with the developments of international relations. . . . [Yet] sovereignty is tending to have a more precise meaning as the status of all members of the highest class of international persons.[17]

In spite of this optimism as to the preciseness of meaning which sovereignty is in the process of achieving, the attempt to determine where sovereignty is "with respect to its object," with respect to mandated areas, for example, leads us into even more intricate labyrinths of legal reasoning:

From the standpoint of international law the sovereign of a thing is that legal person (or group of persons) who has substantially complete and exclusive rights in it; who has the unlimited and exclusive power to change any of the jural relations directed towards it; and who has complete and exclusive freedom to pursue his interests in respect to it.[18]

Then:

. . . . the best method for determining the sovereignty of a thing under international law is to discover the person or group with ultimate powers to change its status, responsible to other sovereigns with respect to it, and competent in fact to change the fundamental municipal law governing it.

Unfortunately, however, modern political facts indicate cases where no state or where several states, either separately or jointly or as a corporation of states, appear to be sovereign.[19] Therefore international law finds room for the concepts of joint sovereignty, divided sovereignty, and sovereignty of international corporations. It suggests, in the idea of sovereign international corporations, the possibility in international law of territorial sovereigns who are not states.[20]

[17] Wright, *op. cit.*, p. 294.
[18] *Ibid.*, p. 295.
[19] *Ibid.*, p. 300.
[20] *Ibid.*, p. 310. An analysis of the various theories as to where sovereignty is over the mandated areas follows: "No less than ten theories of the loca-

The significance of Professor Wright's elaboration in relation to the theory of sovereignty lies in his attempt to retain the concept and the possibility he finds for utilizing many of the various conceptions of analytical jurisprudence in his international legal system. Thus, not only does he retain the terms "partial" and "full" sovereignty, but "internal" and "external" sovereignty, and "political" and "legal" sovereignty, appear as significant terms in international law. And in attempting to solve the problem of the mandated territories we find, in addition, that there is a "sovereignty of things," the determination of which is a practical problem as yet, whose procedure of solution alone has any definiteness.

Interesting, however, is the fact that Professor Wright, the dualist, and Verdross, the disciple of monistic jurisprudence, both have embarked on the task of retaining and utilizing sovereignty as a concept in jurisprudence. Their definitions differ, as one would expect them to, but the attitude toward the concept seems to be a sympathetic one. The term seems to have achieved an extension of life. Sovereignty seems to have found defenders in both monistic and dualistic camps of international law.

We might at this point, simply in order to complete our picture of the relations between international law and sovereignty, resummarize the position of international law in constitutional law as expounded in the systems of Esmein and Jellinek.

International law played but a small part in the theory of national sovereignty as formulated by Esmein. To his mind, it was still incompletely formed; whatever validity it had is

tion of sovereignty have been offered, though many of these have a close enough affiliation to others to admit the grouping under four heads which attribute sovereignty to (*a*) the Principal Allied (and Associated) Powers, (*b*) the mandatories, (*c*) the mandated communities, (*d*) the League" (*ibid*, p. 319). But nothing is added to the discussion of the nature of sovereignty.

due to the strength of opinion or of the treaties into which the state enters. Apart from this, there is no international community forming a union superior to the states.[21] As a constitutional lawyer, Esmein emphasized primarily the first phase of sovereignty—its internal aspect.[22] The elements of sovereignty are essentially those of complete internal control and in addition those which would permit the state to enter into relations with other nations, to make treaties or agreements obligating the nation. Both these aspects are required to establish a full sovereignty. The facts of international law indicate the existence of a series of obligatory relationships. Although Esmein does not go into their nature, he recognizes that since they result from treaties they are not incompatible with sovereignty. Many modern international lawyers emphasize the external aspect of sovereignty, stressing its meaning as "the right to represent the nation and to obligate it in its relations with other nations."[23]

In Jellinek we have seen a similar emphasis on state law

[21] "Pour ce qui est de la communauté internationale, dans laquelle on voudrait voir une sort d'union supérieure à l'état, ce n'est en réalité qu'un courant d'opinion qui se reand parmi les hommes de diverse nations; ou, tout au plus, ce sont les différents états indépendents qui, par raison ou en vertu des traités, se conforment à ce courant d'opinions. Le droit international public, faut de ce droit de contrainte qui réside dans l'Etat, est encore un droit incomplètement forme. Le droit international privé est arrivé à une réalisation presque complète, parce que chaque Etat lui prête son autorité, met à son service ses tribunaux et sa service publique, en faisant une partie de son droit national; mais il en resulte qu'il existe presque autant de systèmes divers du droit international privé qu'il y a de grands Etats civilisés" (Adéhar Esmein, *Eléments de droit constitutionnel* [6th ed.; Paris: Recueil Sirey, 1914], Introduction, p. 36). The only other remarks on international law are in his discussion of the philosophers of the eighteenth century who founded international law: "Ils fonderent en même temps une autre science celle du *droit des gens* ou droit international public" (*ibid.*, p. 268).

[22] Cf. below, p. 11.

[23] Thus Bonfils (*Manuel de droit international public*), following Pradier-Fodere as his source, divides sovereignty into internal and external sovereignty, although recognizing the essential connection between the two. Internal sovereignty means autonomy; external sovereignty means inde-

as the important law. International law, though law in a sense, is "anarchistic" law. Like Esmein, Jellinek saw it as "not yet completely formed." Its outlines were being drawn with some definiteness in treaties between the various states, but international law was still a law without a superior external sanction and dependent upon the auto-limitation of the states.[24] It bound the states only as they obligated themselves.

pendence (*ibid.*, p. 161). "L'indépendance c'est l'exclusion de l'ingérence d'autrui . . . ." (*ibid.*, p. 168).

Paul Fauchille (*Traité de droit international public* [Paris: Rousseau & Cie, 1922], sec. 164, p. 224) makes a similar distinction: "La souveraineté est ou intérieure et intranationale ou extérieure et internationale" (he follows Bonfils). Amos S. Hershey (*Essentials of International Public Law* [New York: Macmillan Co., 1914]) takes a similar point of view.

H. W. Halleck (*Elements of International Law* [Philadelphia: Lippincott & Co., 1866], p. 42) asserts: "A sovereign state may therefore be defined as any nation or people organized into a body politic and exercising the rights of self-government." It must have the "right to exercise its volition and the capacity to contract obligations."

Charles Hyde (*International Law* [Boston: Little, Brown & Co., 1922], sec. 7) recognizes that a state must have people, territory, government, and the right to enter into relations with the outside world, before it can be recognized internationally as a state. The right to enter into foreign relations is stressed as essential.

Franz von Litszt (*Das Völkerrecht* [3d ed.; Berlin: J. Springer, 1904], sec. 61, p. 44) states: "Nur die souveraine Staat ist völkerrechtiges völkerrechtliches Rechtssubjekt. Souveranität aber als Eigenschaft des Staats ist hochste nach aussen wie in Immern selbständige von keinem Höhern abhängige Herrschermacht (die *Summa Potestas*). Sie aussert sich in der uneingeschränketen völkerrechtlichen Handlungsfähigkeit."

[24] "Die Einschränkung der staatlichen Herrschermacht erfolgt nach aussen hin durch das Völkerrecht ist ausschliesslich das Recht zwischen Staaten, soweit sie von einander unabhängig sind." This emphasis is directed against Kaufman (*Die Rechtskraft des internationalen Rechtes* [1899]) who would make individuals the legal subjects of international law. This would destroy the dominant theory of the states and would leave to a *civitas maxima*, according to Jellinek's footnote, p. 349: "Alle völkerrechtlichen Handlungen sind nämlich nur durch Akte des Imperiums möglich. So liegt z. B. in jedem Staatenvertrag, der zu Leistungen verpflichtet, eine Verpflichtung der Herrschergewalt selbst, die nur durch einen Akt des Herrschers vorgenommen werden kann" (Georg Jellinek, *Recht des modernen Staates: Allgemeine Staatslehre* (Berlin: O. Haring [J. Springer], 1900).

The treaties they entered into, the customary rules they recognized and acquiesced in, were binding, but—and this is significant—on the states, not on their individual members. To reach within the state required a definite state act, an act by the government. For international law was a law among states, not the law of a *civitas maxima* operating on individuals. Because this is so, the rules of international law were subordinate to the interests of the states. "International Law was made for the states; not the states for International Law." Treaties and conventions are therefore subject to the higher, primary, interests of the individual states. The strength of international law depends upon the will of the individual states, upon the extent of their auto-limitation. It is, in other words, subordinate to state sovereignty.

Duguit uses the concept of social solidarity which underlies his entire jurisprudence in constructing also international law. The soverign state, as we have seen, is for him a false, metaphysical concept. It is impossible therefore to build a system of international law upon the basis of municipal law. International law can neither be derived from the public law of a given state nor can it result from the collaboration of various states, from *Vereinbarung* and auto-limitation.[25] His theory of international law is that it arises from the intersocial relationships which transcend the old state lines. The consciousness of an intersocial dependence is still an individual consciousness, and the individuals who feel it are bound by it. Where the political status of the individuals in the group is the same for each, that consciousness and the subsequent law are pertinent to the individuals; the same is true if there is a differentiation in status which creates governors and governed. In such a case the intersocial obligations will be felt

[25] Léon Duguit, *Traité du droit constitutionnel* (Paris: Fontemoing, 1921), sec. 62, "Le droit public international," pp. 550 ff.

with more force by the governors, but it must still be recognized that they feel this force as individuals who, because of their peculiar position, are able to respond more readily to the rule of intersocial solidarity.[26] Modern international law, closely analyzed, is the means of creating and operating international public services. Even the League is an attempt at a public service of common defense.[27]

The insistence on international law as a law applying directly to the governors qua individuals meets with the objection that such a notion detracts from the permanence of international agreements since the governors who may incur the original obligations are constantly changing. The notion that the obligation is on the state as a personality lends more permanence to international law. Duguit answers by pointing out that the declaration of will is not the creative cause of a juridical situation, but simply the application of a juridical norm which the situation warrants. This juridical norm will be permanent and binding on all the governors, present and future, so long as the situation remains. Sovereign, then, if the term were admissible, is the juridical norm—apart from it there are but individuals subordinate to it, whether they be representatives of nations or private citizens.

To summarize: The review of the status of sovereignty in international law among the various jurists whom we have studied in detail has shown us the survival of the older conception of sovereignty in a monistic system, where sovereignty is a unified power which can direct itself externally as well

[26] "Le droit international se compose, comme tout droit, d'impératifs qui s'addressent au individu, et qui ont pour fondement la solidarité existant entre eux, ou, si l'on préfere, la conscience qui les individus ont, à un moment donne, de cette solidarité" (*ibid.*, p. 560).

[27] "Si l'on étudiait en detail le droit international modern, il serait aisé de montrait que la création et le fonctionnement de services publics internationaux devient l'object par excellence du droit international modern" (*ibid.*, p. 560).

as internally. The older Austinian theory, as well as national sovereignty, in England, America, and on the Continent, reflect this view. It has shown sovereignty as a unified power, but one which would limit itself and as a result of its limitations create an international law. This international law was contingent upon the will of the state, which, "though bound, was not subject" to it and could release itself. It has shown us also a conception which viewed sovereignty as dual—as two distinct symbols; in one case, an attribute of state power; in the other, a description of the status of a political community in its relations to others. As a qualification of state power, sovereignty has meaning as auto-limitation; as a description of status, it means independence from foreign states.

The recognition of international law as external public law, or as auto-limitation, tends to increase the significance of the role of sovereignty. Among dualistic lawyers the tendency is away from identifying sovereignty with independence and toward making it describe the "normal status" of entities interrelated in the family of nations. The term is still one which is confusing in the variety of its meanings and in the lack of definite content which results from the continuous stress on its relativity to the general situation in the family of nations and of the particular state or even territory under consideration. In the monist conceptions of Duguit, Krabbe, and Kelsen, the term is well-nigh dispensed with. Among them, if it survives at all, it survives simply as a word describing the total legal order rather than as an accredited, prestigeful concept of juristic value. Verdross is one modern, monistic international lawyer, however, who would give sovereignty a relative value as descriptive of the status of entities in more immediate relation with international law. Sovereignty would describe entities which received their competence from international law directly, whereas juristic persons and communities (provinces

and the rest) which derived their competences indirectly through these entities (we would call these "states" in the common parlance) would be nonsovereign. The weight of international monistic opinion appears, however, to be against such use of the term. If it is to be used, it should refer to the status of the entire international community, or the total legal order, or the highest "rule of law."

CHAPTER VII

SOVEREIGNTY AND THE BRITISH EMPIRE

THE PRECEDING chapters have discussed the general patterns of sovereignty and their relations to certain constitutional and international systems of jurisprudence. The problem of the composite state has not been specifically dealt with. During the nineteenth century confederations and federations such as those of the United States, Germany, and Switzerland had stimulated numerous theorists.[1] In the twentieth century a similar problem has been presented by the evolution of the British Empire. In this chapter the attempt will be made to view the situation of that developing empire as it relates to the theory of sovereignty.

Historically, the British Empire resulted from a series of accretions of territory and extensions of jurisdiction by the English. First Wales, then Scotland, then Ireland, then the colonies across the seas and in Asia, were joined to the so-called "empire." English, Irish, Scotch were but the nucleus for a whole range of diverse races and peoples who came under the jurisdiction of the British. Mohammedan, Hindu, and Jew, as well as Christian; Eurasian and African—all are subjects of the empire.

The territories related to Great Britain are divided into self-governing dominions;[2] self-governing territories with

[1] Cf. Charles E. Merriam, *History of the Theory of Sovereignty since Rousseau* (New York: Columbia University Press, 1900).

[2] Canada, Newfoundland, Australia, New Zealand, South Africa, and Southern Rhodesia. For a summary discussion of the composition of the British dominions and colonies cf. William B. Munro, *The Governments of Europe* (New York: Macmillan Co., 1933), chap. xix, pp. 356 ff.

some powers reserved;[3] territories without complete self-government in any field whose general administration is under the control of London (Crown Colonies);[4] and protectorates,[5] condominiums,[6] and mandates.[7] All these became related to the Crown through the gradual process of acquisition by settlement or discovery or as a result of economic and military imperialism.[8] In the early stages of this development, the newly acquired lands were simply additional parts of the king's domain, part of the lands over which his jurisdiction extended; and the already established governmental institutions, political and juristic, were easily able to encompass them. The theory of national sovereignty found little necessity for change with such acquisitions. Legal sovereignty was still lodged in the sovereign Parliament; the "King in Parliament" still retained ultimate control over the territories which were subject to the Crown.[9]

But the growth of the populations of the various territories and their insistence on the right of self-government—their attempt, in other words, to set up their own governments in accordance with the doctrine of national sovereignty—soon brought the problem of the relation of the territories to the mother-country into relief. When the United States, for in-

[3] India and Malta.

[4] Bermuda, the Bahamas, and Barbados; Ceylon, Cyprus, and Jamaica; Hong Kong, Nigeria, Trinidad, Gibraltar, Ashanti, Basutoland, etc.

[5] North Borneo, Sarawak, and the protected states in India, Burma, etc.

[6] Egyptian Sudan and the New Hebrides.

[7] Palestine.

[8] For an exhaustive history of this development see *The Cambridge History of the British Empire* (8 vols.). For a brief survey written for the non-English reader cf. J. P. Bulkeley, *The British Empire: A Short History* (Oxford: 1921).

[9] Cf. William R. Anson, *Law and Custom of the Constitution* (Oxford: Clarendon Press, 1896), II, chap. v, "The Colonies," esp. sec. 3, 264 ff. The "Crown in Council" rather than the "Crown [or King] in Parliament" has actual jurisdiction over some territories; but the ultimate control legally is still in Parliament.

stance, revolted and set up a government of its own based upon the dogma of national sovereignty—"We, the People,"—the fact began to be realized that it might be necessary to consider the populations of the colonies as well as those at home. This resulted, after half a century and warnings of impending self-determination in Canada, in a change in the colonial policy of the British. Actually, more and more heed was paid to the colonial desires, and the tendency toward self-government was, in the main, encouraged rather than opposed. Canada was the first to profit by this new policy. The Durham Report of 1839[10] inaugurated the trend which soon led to responsible government in Upper and Lower Canada and eventually to Canadian federation under the British North America Act of 1867. The Act of 1867 is still the constitution of Canada. In chronological order, Australia received its Commonwealth Constitution in 1900; New Zealand, in 1907; the Union of South Africa, in 1910; and the Irish Free State, in 1921.[11]

For the jurists of the school of national sovereignty, the granting of these constitutions presented a problem in interpretation. Does the granting of the right to legislate and to govern itself to Australia, for example, make any difference in the nature of parliamentary sovereignty which had hitherto described the relations of the king to his domains? Or does it not? In Esmein,[12] the French jurist whose formulation is typical of the modern school of national sovereignty, the problem is recognized and solved (for the moment—1914) without disturbing the traditional constitutional formulation. His reasoning follows the argument that the constitutions of the

[10] John George Lambton, Earl of Durham, *Report on the State of Affairs in the Canadas* (1839).

[11] Frederick L. Schumann, *International Politics* (Chicago: University of Chicago Press, 1933), pp. 382 ff., esp. p. 388.

[12] Adéhar Esmein, *Eléments de droit constitutionnel français et comparé* (Paris: Recueil Sirey, 1914).

dominions were and are, so far as they have legal significance, acts passed by the sovereign Parliament in England.

> But this constitution made by the people of the state of Australia [d'Etat d'Australie], voted by the Australian people, could only acquire the force of law by an act of the English Parliament. Throughout the whole extent of the English possessions, in law, the sovereignty belongs to the Emperor-King, and only the House of Lords and the House of Commons of England are associated with this sovereignty. It is by a concession of the sovereign, which is analyzed by the English authors as a delegation, that the English colonies such as Canada and Australia have been able to get this political liberty so completely, this almost absolute independence which they enjoy.[13]

In this manner traditional formulation of English jurisprudence was not disturbed; there were, however, other problems which Esmein did not touch in his analysis of the situation. He realized that there was a development away from the "monopoly which lies in the English Parliament." But logically, from his own point of view, he might have raised the problem of the relation between parliamentary sovereignty (of the English Parliament) and representative government. Would not national sovereignty require universal suffrage in the choice of representatives for the sovereign British legislature? Is national sovereignty compatible with a government whose base of representation is narrowed to a relatively minor portion of the territory governed? These problems Esmein did not mention. Yet they loom large in the arguments of the members of the British Empire who wanted completely autonomous governments or representation in the selection and formation of a truly imperial Parliament. For the essential demand of the dominions, at first, was for self-government, which meant the ability to participate in the determination of the course of their state life.

[13] *Ibid.*, p. 10.

A. V. Dicey, who represents national sovereignty in England as Esmein does in France, assumes a position essentially similar to Esmein's:

> In the first place, the Imperial Parliament still claims in 1914, as it claimed in 1884, the possession of absolute sovereignty throughout every part of the British Empire; and this claim, which certainly extends to every Dominion, would be admitted as sound legal doctrine by any court throughout the Empire which purported to act under the authority of the King. The constitution, indeed, of a Dominion in general originates in and depends upon an Act or Acts of the Imperial Parliament; and these constitutional statutes are assuredly liable to be changed by the Imperial Parliament.
>
> . . . .
>
> Parliament, in the second place, had long before 1884 practically admitted . . . . that a real limit to the exercise of sovereignty is imposed not by the laws of man but by the nature of things, and that it was in vain for a parliamentary or any other sovereign to try to exert equal power throughout the whole of an immense Empire. The completeness of this admission is shown by one noteworthy fact: the Imperial Parliament of 1884, and long before 1884, had ceased to impose of its own authority and for the benefit of England, any tax upon any British colony. The omnipotence, in short, of Parliament, though theoretically admitted, has been applied in its full effect only to the United Kingdom.[14]

It is important to retain the theory, says Dicey, in order to understand "the extent to which this sovereign power is on some occasions actually exerted outside the limits of the United Kingdom" and "it is found further that even to the Dominions themselves there is at times some advantage in the admitted authority of the Imperial Parliament to legislate for the whole Empire." Of course, the imperial Parliament limits itself, in legislating, to matters which are directly and indubitably affected with imperial interest. It insists on the

[14] *Law of the Constitution* (New York: Macmillan Co., 1927), Introduction, p. xxv.

right to make treaties and to involve all its dominions in war.[1] On the other hand, it permits internal independence; it does not disallow colonial legislation which may be opposed to the interests of Great Britain; it does not object to a dominion's raising its own military and naval forces for defense; it does not withhold permission from any dominion to amend its constitution, although that constitution is an act of the imperial Parliament. It is willing to permit any dominion to withdraw from the judicial supremacy of the Privy Council, i.e., to abolish the right of appeal to the Privy Council. And it has fostered Imperial Conferences "for consultation and discussion on all matters concerning the interest and the policy of the Empire." So Dicey summarizes the progress of the English constitution[15] from 1885 to 1914 without feeling any necessity to change the legal formulation which considers parliamentary sovereignty a juridical reality because of it.

After the World War, however, the tendency to secure independent action and freedom from "imperial" control was very definitely accelerated. During the war, on December 15, 1917, when the entire empire was co-operating in the face of a common foe, the demand for independence was very skilfully placed before members of both Houses by General Smuts of South Africa, at a banquet in his honor.[16] His speech

[15] For other sources enlarging on various phases of the relations of the dominions to Great Britain consult: A. Berriedale Keith, *Responsible Government in the Dominions* (Oxford: 1912), *The Constitution, Administration, and Laws of the Empire* (London: W. Collins Sons, Ltd., 1924), and *The Sovereignty of the British Dominions* (London: 1929); P. J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law* (London: Longmans, Green & Co., 1929); Bulkeley, *op. cit.*; A. Lawrence Lowell and H. Duncan Hall, "The British Commonwealth of Nations," *World Peace Foundations* (Boston: 1927); W. Y. Elliott, *The New British Empire* (New York: McGraw-Hill Book Co., 1932); and Victor K. Johnston, *The International Status of the British Dominions* (Chicago: University of Chicago Doctor of Philosophy thesis, 1926).

[16] Jan C. Smuts, "The British Commonwealth of Nations," a speech made December 15, 1917.

indicated no new approach to the theory of sovereignty; it indicated, however, that that nationalism which served as the basis for the theory for Esmein, and even for Dicey, was also at work in South Africa and elsewhere throughout the dominions. It indicated that the basis of Dicey's later juristic reasoning was crumbling.

Smuts's speech strikes at the heart of the problem, actual and constitutional:

. . . . the British Empire, or this British Commonwealth of Nations, does not stand for unity, standardization, or assimilation or denationalization; but it stands for a fuller, a richer, and more varied life among all the nations that compose it. . . . .

There remains the other question—a very difficult question—of the future constitutional relations and readjustments in the British Empire . . . . too often we think of it merely as one State. The British Empire is much more than a State. I think the very expression "Empire" is misleading, because it makes people think as if we were one single entity, one unity, to which that term "Empire" can be applied. We are not an Empire. Germany is an Empire. So was Rome and so is India, but we are a system of nations, a community of States, and of nations far greater than any empire which has ever existed; and by using this ancient expression we really obscure the real fact that we are larger and that our position is different, and that we are not one nation, or state, or empire, but we are a whole world by ourselves, and consisting of many nations and states and all sorts of communities under one flag. We are a system of states, not only a static system, a stationary system, but a dynamic system, growing, evolving all the time toward new destinies. . . . .

This speech with its iteration of the fact that the empire is not a state, that there are states within it, that it is a system of states, reflects the attitude of the members to the so-called "empire" because of its implications of domination and sovereignty.

The desire for autonomy internally and for independence externally grew even stronger after the war. The insistent Irish endeavors to free the island need no elaboration here: suffice it to recall the spectacular insistence on the sovereignty —a national sovereignty, be it remembered—of the Irish Republic by De Valera and his party.[17] A similar spirit was apparent elsewhere, although not with the disorders and difficulties attendant upon the Irish question. In South Africa the dissentients, under the leadership of Herzog, expressed a similar sentiment in the struggle involving the symbolism of the flag.[18] In Canada, too, the same sense of mature nationhood found recurrent expression.[19]

The Imperial Conferences—Imperial rather than Colonial since 1907—felt it increasingly necessary to clarify the formal and constitutional status which had been developing during the pre- and post-war period. One result of the war, the League of Nations, to which the dominions came in as original, full members, served to further complicate the question of their status and the nature of their relationship with Great Britain. Were the dominions, accepted members of the League, fully sovereign states? Were they, therefore, independent of the empire? or were they still in and of it? If they were the latter, what then is the nature of the empire itself? Is it a state? Are its members states? And what is the relation between them and it; between them and states not in the empire?

With the complexities of these problems the Imperial Con-

[17] For a history of the Irish struggle before and since the war, see S. Gwynn, *The History of Ireland* (London: Macmillan Co., Ltd., 1922), and Darrel Figgis, *The Irish Constitution* (Dublin: 1922).

[18] Cf. E. H. Louw, "The Economic and Political Problems of the Union of South Africa," *Great Britain and the Dominions* (Chicago: University of Chicago Press, 1928).

[19] Cf. John W. Dafoe, "The Problems of Canada," *Great Britain and the Dominions.*

ference of 1926 sought to cope, and under the leadership of Lord Balfour it issued its famous report, *The Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926.*[20] The *Report* reveals the difficult nature of the problems and the attempt made to arrive at a satisfactory solution, one which would reconcile the nationalism and particularism of the various parts with the very definite feeling of oneness that pervades all the various parts in spite of their differences. The essential statement, concerning the general question of the relation of Great Britain and its Parliament to the other parts of the empire, lies in the italicized part of the *Report* which we quote:

> We refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations.*
>
> These points of autonomy and equality of status are stressed without for a moment losing sight of the fact of imperial unity, as well as of practical inequalities which arise from the actual conditions in political reality.
>
> And though every Dominion is now, and must always remain the sole judge of the nature and extent of its cooperation, no common cause will, in our opinion, be thereby imperiled.

Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations. But the principles of equality and similarity, appropriate

[20] Cmd. 2768, 1926. Reproduced in Baker, *op. cit.*, Appendix II, pp. 387 ff.; also in *International Conciliation Documents*, No. 228, March, 1927 (New York: Carnegie Endowment for International Peace), pp. 108 ff.; also in Elliott, *op. cit.*, Appendix II.

to status, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with the questions of diplomacy and questions of defense, we require also flexible machinery—machinery which can from time to time be adapted to the changing circumstances of the world. . . . .[21]

This *Report* was considered as an epoch-making one.[22] It occasioned discussion as to its actual significance. In English constitutional theory it appears to recognize the various dominions in the British Empire as free from any undesired interference by the imperial Parliament. Autonomy, equality, and independence it concedes. It indicates the unifying element to be "common ideals, common aspirations, and common desires."[23] The very word "empire" is a misnomer; "Ours is a Commonwealth of British Nations."[24]

[21] The conference determined the status of the governor-generals of the various dominions and suggested a change in the title of the king to indicate the increased independence of Ireland. Thus his title now reads: "George V, by the grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India." It had read "George V, by the grace of God, of the United Kingdom of Great Britain and Ireland, etc. . . ." (Cmd. 2768, 1926).

[22] Nicholas Murray Butler sees it thus: "Students of Constitutional History and Law will see in this document another fundamental and massive contribution to the progress of the movement for the establishment and organization of liberty among those English-speaking peoples that are gathered in the British Commonwealth of Nations. This document takes its place in the long procession of epoch-making acts and papers which may be said to begin with Magna Carta. . . . " (Introduction to the *Report*, in the *International Conciliation Documents* [1927], p. 7).

[23] Such is the attitude of the Prime Minister of Australia in 1926: "We have brought into existence this extraordinary, this intangible, this ununderstandable thing, composed of communities absolutely free, independent, with self-governing rights, with their own parliaments, absolute masters of their own destinies and yet bound together by their common allegiance to the Throne, by their common unity as citizens of the British Empire. Yet I agree with you that neither the one nor the other of these things would have been sufficient to hold a great empire together. It is only because behind all we have common ideals, common aspirations, and common desires" (address by the Rt. Hon. Stanley M. Bruce, 1926; reported *ibid.*).

[24] *Ibid.*

Some consider the *Report* to have affected the legal situs and nature of sovereignty. The comments of A. Lawrence Lowell reflect the idea which Dicey had sought to oppose in 1914—the idea that sovereignty shifted to the dominions, legally, as a result of the Imperial Conference of 1926:

. . . . the ultimate source of authority, and in that sense, the sovereignty of Great Britain, although delegated to Parliament, resides, in the last resort, in the electorate, as from this time forth it will also in the Dominions.

The only bond then, is the King; not the King in Council or in Parliament, but the King in person.

States, indeed, bound together in an association of any kind, without a common organ of government, must in the nature of things be legally and politically independent; because the very definition of independence is not being subject, wholly or in part, to any control by an external authority.[25]

On the other hand, there are those who maintain that sovereignty, full and complete, does not yet belong to the various governments which aid the king to rule over his domains. The essential thing to bear in mind is the unity of the empire:

It must be remembered that under the British theory of Government, all executive authority is vested in the crown and the one-ness of the crown means the one-ness of the executive authority throughout the King's dominions. The King's government in different parts of the Empire may be carried on by different ministries and through the medium of different ministers, but the authority which they are exercising is only so much of the King's executive functions as is delegated to them.[26]

There are those, too, who do not at all underestimate the political significance of the *Report* or of the Imperial Confer-

[25] *Op. cit.*, p. 581.

[26] This point of view was formulated by Sir Cecil J. B. Hurst, "The British Empire as a Political Unit," *Harris Foundation Lectures, 1927* (Chicago: University of Chicago Press, 1928).

ences which both preceded and succeeded that of 1926; they point out, however, that these Imperial Conferences are all consultative and advisory; that the legal forms of English constitutional procedure have been and are being preserved throughout; that even the delegation of powers in the Statute of Westminster, which in practice amounts to the abdication of power, is done by an act of the sovereign Parliament. And they suggest that, legally speaking, what one Parliament can pass, another may rescind; for no Parliament can bind its successors. Of course, it may appear improbable, perhaps even absurd, to consider the repeal of certain acts under present conditions, but the most extreme Austinian recognizes the restraining force of expediency and utility upon the sovereign.

There are, therefore, some who suggest that the legal status of the English Parliament may remain; that it may legislate for the empire; and that it may retain the legal sovereignty of the empire; *provided* it is restricted in its legislation to acts which the dominions had previously requested, or to which they had previously assented. In this manner the legal sovereignty of the imperial Parliament might be preserved.

> At present, vestiges of the old order of subordination to the purely British Crown still remain. But they exist practically on sufferance, since the United Kingdom has agreed that reservation of Dominion legislation for His Majesty's pleasure . . . . may be abolished at the request of the Dominions. . . . . As long as they have not acted themselves to effect a change, however, the law will remain one of Imperial control. It is even possible for the Parliament at Westminster to continue to legislate for them, with the constitutional proviso that no act shall extend to them for which their assent has not been previously, formally, obtained. The Statute of Westminster is itself a case in point and the future may see a similar procedure followed in extending the powers of the Dominions by British acts.[27]

[27] Elliott, *op. cit.*, pp. 46–47.

P. J. Noel Baker's important volume, which seeks to discuss the *Present Juridical Status of the British Dominions in International Law,* a volume which E. J. Phelan in 1931 called "the most recent and authoritative study of the relation between the Dominions and the League," asserts that, in spite of their practical political prestige and autonomy, the dominions do not have the status of "independent sovereign states" in international law. Baker views the question as an international lawyer and admits that it is possible to make a prima facie case for the view that the dominions differ very little, if at all, from independent sovereign states.[28] Nevertheless, he refuses to admit that the dominions are persons of international law of identically the same kind as those which are called fully independent sovereign states.[29] This is so because of the special nature of the relations *inter se* of the dominions and the various elements of the British Empire—relations based on the bond of unity which results from a single king, from a sense of common obligation and relation. Baker does not answer the questions of wherein lies sovereignty, whether there is sovereignty, and what is sovereignty in the British Empire and its parts; he denies the importance of the question:

> But the truth is that the nineteenth century phraseology of International Law no longer fits the facts. The "independent sovereign states" of that epoch have no longer the untrammeled sovereign independence that they used to have.

We might, he thinks, consider the dominions as part sovereign, although even this finds little favor in his sight.[30] And he concludes:

> This, indeed, is perhaps all we need to know about the legal "condition" of the Dominions in International Law. If we have

[28] Baker, *op. cit.,* p. 354.
[29] *Ibid.,* p. 356.
[30] *Ibid.*

a precise conception of the international relations which in fact they maintain, if we have a complete and accurate idea of the legal rights and duties in International Law which they have assumed, we may confidently neglect the battle about such words as statehood, sovereignty, and independence.[31]

This point of view seems to predominate among those concerned with the problem, with few exceptions. The jurists and statesmen seem little concerned with how the status and the relationship be named; they are rather concerned with what it is. Is the British Empire a personal union or is it more than that? Do treaties between the empire and foreign states apply between the elements of the empire? How is a treaty to be signed? What external relations are within the exclusive province of the member-states? what within the empire? But whether or not the empire is sovereign or its members are sovereign—this causes little unrest to the imperial jurists.

In Duguit and Kelsen and Krabbe, who deny the older notion of sovereignty, obviously the problem of its nature and situs within the British Empire has no relevance. The same is true of Laski, whose attitude to the problem of sovereignty is the subject of next chapter's discussion. The attitude of some outstanding British students of the problem we have already seen. Closely reflecting their attitude toward the empire,[32] yet fitting it into his general approach to international law, is the American international lawyer, Quincy Wright.[33] He recognizes the practical ability of the empire to function without a resolution of the problem of sovereignty.[34] He recognizes, too, the fact that there is no single, central, superauthority for the empire;[35] but then that is not necessary.

[31] *Ibid.*, p. 358.
[32] That of Sir Cecil Hurst, e.g.; or John W. Dafoe, *op. cit.*
[33] *Mandates under the League of Nations* (Chicago: University of Chicago Press, 1930).
[34] *Ibid.*, p. 265.
[35] *Ibid.*, p. 273.

As we have seen, Dr. Wright recognizes the possibility of divided sovereignty; and the sovereignty of the British Empire is apparently of such nature. Its sovereignty is divided,[36] and consequently that of the dominions is limited sovereignty.[37]

It would seem, to date, that this description of the nature of imperial sovereignty is accurate, legally. It is so juristically from the point of view of the international lawyer, who sees the dominions exercising the rights of normally sovereign states, declaring for themselves whether their status will be one of war or peace, as Canada did in regard to the famous episode of Chanak in 1922; negotiating treaties and sending ambassadors; signing multilateral agreements and participating as a full member in the League of Nations; and, at the same time, admitting that they derive this right and permission from acts of Parliament at Westminster. In such a situation the designation "divided sovereignty" seems most fitting. The Statute of Westminster, 1931,[38] indicates very significantly that, albeit practically sovereignty may reside where the seat of power is in any given situation, nevertheless the jurists of all the empire are co-operating to maintain the old legal forms and to confirm through legal enactment whatever has, through constitutional developments, achieved political acceptance. It might therefore be maintained juristically even yet —what would perhaps be absurd as a political reality—that parliamentary sovereignty still exists for the empire now as it did for Dicey and Esmein. However that be, for the Eng-

[36] *Ibid.*, p. 301.

[37] *Ibid.*, p. 305. Even Baker, *op. cit.*, p. 356, concedes that, if one were to use "the antiquated terminology of the nineteenth century lawyers, ... they are, perhaps, part-sovereign states." But he does not favor the term. He prefers to avoid it.

[38] George V, Vol. XXII–XXIII, chap. iv (1932). The Statute of Westminster, 1931, is cited in full in *Current History*, January, 1932, pp. 1599 ff. Its purpose is "to give effect to certain resolutions passed by the Imperial Conferences held in the years 1926 and 1930."

lish lawyers it certainly is a reality. But ever and always it is tempered in its exercise by keen recogniton of the actual forces in the total situation.

This glance at the developments in the British Empire indicates certain things very definitely. It indicates, for one thing, that there still is, within the empire, an attempt to retain the logical coherence between the constitutional developments in the British Empire and the traditional legal philosophy of the English. This reveals itself in the very formal attempts to legitimatize the constitutional developments and give them formal legal recognition through acts of Parliament. It indicates, for another, that the philosophy of national sovereignty, the recognition of the essential relationship between nation and state, between a nation and its government, is still powerful; for it is the basic argument advanced by the dominions for their autonomy and independence. It indicates, too, that the so-called antiquated conception of divided sovereignty which the nineteenth century thought had been destroyed in Germany with the loss of caste of Waitz, and in the United States with the failure of the South in the Civil War, has reappeared as a useful tool in describing the nature of a political entity in the family of nations. It indicates, too, however, that the newer attitude of indifference to the concept of sovereignty as one which is a hindrance rather than a help, as one which might with impunity and even profit be disregarded, is advancing.

CHAPTER VIII

POLITICAL PLURALISM—LASKI

ESMEIN, Jellinek, Kelsen, and Duguit were essentially jurists. In the main, with the exception of Duguit, the theory of sovereignty found preservation in some form or other. In the thinking of Harold J. Laski, however, whose concern is not with the legalism of any jurisprudence but rather with the realities of politics, the traditional concept of the jurists has found scant sympathy.

The course of Laski's thought reveals the influences of German sociology as it filtered in through Barker. It reveals the influence of the positivistic sociology of Duguit and of his antipathy to the sovereignty concept. It reveals the strength of English liberalism's insistence on the individual, and of English socialism's demand for economic democracy. It reflects the transformation, the maturation, of Laski's thinking as he met the political problems of twentieth-century democracy under a capitalistic economy which was finding itself unable to satisfy the newly emergent laboring classes in their trade-unions and associations. It shows how Laski found it necessary to cease disdaining the discredited state and instead reinstitute it in its previous functions with but minor changes. In spite of it all, however, Laski remained steadfast in his rejection of sovereignty, its monistic connotation and its element of dominating command making it always irreconcilable with the actual pluralism in society.

Especially significant in the earliest thinking of Laski was an article written by his teacher, Ernest Barker,[1] which shaped

[1] Cf. W. Y. Elliott, *The Pragmatic Revolt in Politics* (New York: Macmillan Co., 1928), p. 143 and n. 1, concerning Laski's admission of

the argument of Laski's first chapter in his earliest book on the problem of sovereignty. Essentially, it incorporates Gierke's and Jellinek's sociology and in this manner serves to link Laski with the Continental attitude. The English state, runs Barker's argument, is discredited. It always has been. The Magna Carta, expressing the feudalism of the barons; the revolution of 1688, expressing the demands of property and of the dominant economic interests of the period; the non-conformists, expressing the religious claim—all these have discredited the state in pressing their own claims to rights and privileges against it. The process of discrediting the state has recently been assumed by other shoulders. The High Anglican Church asserts religious autonomy and independence against the state. The Marxists and all the other brands of socialists persist in clamoring for economic liberty. Both church and socialists are innovators only in that their demands are in the name, not of individuals, but of groups. Figgis' appeal, for example, is not so much for the individual (though this element is by no means absent) as for his church—a group with real personality. Similarly, the demand of the socialists is for their class rather than for single individuals. And Barker, following Gierke and Maitland, subscribes to this emphasis on groups.[2] But what is a group? The group is an idea—a single organizing idea permeating simultaneously and permanently a number of personalities.[3] If we were to talk in terms of

his debt to Barker. The internal evidences of Barker's article and Laski's chapter in one of his first books, *Studies in the Problem of Sovereignty*, 1917, New Haven: Yale University Press, are sufficiently clear to anyone who will make the comparison. Laski himself cites Barker's article at the end of the first chapter.

[2] "The problem of resistance is in actual life always a problem of groups. The jurists may set limits to the state in the name of the individual; practical resistance is always a matter of group-consciousness" (Ernest Barker, "The Discredited State," *Political Science Quarterly*, February, 1915, p. 110).

[3] "The state is the same so long as its scheme of composition is the same.

Jellinek, we should find it identical with his *Verbandseinheit* due to a teleological unity. It is an association of the same nature as other associations, differentiating itself, however, in its purpose. Here, too, Barker's idea parallels that of Jellinek. For the latter, too, the thing which differentiates the state from other *Verbandseinheiten* is its purpose.[4] The agreement between the two, moreover, extends to denying absolute validity to the state idea simply because it is such; both deny any essential relation of sovereignty either to the state or to public opinion. Both recognize the relativeness of concepts.[5] For both, the force of any idea depends upon the strength of its "tug on the heart-strings," which again, in other terms, would mean upon its emotional and psychological force.[6] This applies to law as well as to the state. Barker draws on Gierke for the statement that law "is the result not of a common will that a thing shall be, but of a common conviction that it is."[7] Since this is so, obviously he, no more than Jellinek or Duguit,

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Its identity resides not in any single transcendent personality, but in a single organizing idea permeating simultaneously and permanently a number of personalities" (*ibid.*, p. 111).

[4] "We may eliminate personality and will—transcendent personality and transcendent will—from associations; we may be content to speak of associations as schemes in which real and individual persons and wills are related to one another by means of a common and organizing idea. We may conceive of the state as such a scheme based on the political idea of law and order; we may conceive it as containing, or at any rate, co-existing with a rich variety of schemes based on a rich variety of ideas" (*ibid.*, p. 113).

[5] "Other times; other fashions. . . . At different times different societies may claim a final allegiance; and at one and the same time two societies or more may tug at the same heart-strings with equally imperative demands" (*ibid.*, p. 117).

[6] "It may be that there is no other source of adjustment among the associating ideas of a many sided community except omniscience which we admittedly do not possess. It may be that the state idea is but *primus inter pares*—as ultimate as, but hardly more ultimate in the last resort than other ideas which can quicken the pulse and fire the heart. Our universal may thus turn out to be a federal sort of thing" (*ibid.*).

[7] *Ibid.*, p. 119.

can subscribe to a metaphysical, all-embracing, all-subsuming, all-adjusting idea of the state. There may be something to sovereignty, as in independence in external affairs, but internally it leads to a false view of law and to a false conception of the state.[8] For internally what we have is an ordered life among many associations. We have what Barker is pleased to term "polyarchism," and what Laski later calls "pluralism." The problem of polyarchism is the problem of establishing an equilibrium—a problem which "is likely to be settled by the needs of mere ordered life."[9]

Thus a point of view reflecting the newer thought and tendencies in political theorizing impresses itself upon Laski. It faces the fact that there is no unity in society, either in the source or in the nature or application of power. Polyarchism, many sources of power, power divided, diffused, atomized, or crystallized in some molecular groupings—this is a fact which in political life had hitherto been very little emphasized, even by those who recognized it. The idea of unity in state force persisted, no matter what fate was meted out to the theory of sovereignty. Theorists, in general, were always willing to recognize at least a formal semblance of unity, which had some basic validity in the concentrated force which they conceived as supporting the state. With this concept of polyarchism, and its later positive development in pluralism as political doctrine, however, we get a conscious restatement of the nature of political power, at least in modern democratic governments. The implications of this emphasis on the pluralistic character of the state and society are developed in Laski's writings.

[8] "In foreign affairs it is true, that there is a point in emphasizing the independence or ultimacy of a determinate political authority: only upon such terms can it negotiate with any finality. But internally it leads to a false view of law which it degrades to the mere will of the sovereign. . . . It substitutes unitarianism for federalism. . . ." (*ibid.*, pp. 119–20).

[9] *Ibid.*, p. 120.

L ers the problem of sovereignty vital for politi- cal s investigation of it, however, leads him to a reali: it is but an expression of the quest for social unit alization of the collective body. He refuses to see a reality different from any other collective bod all-absorbing body. It is but "one of the groups to w dividual belongs." It secures its power from its abili e assent among the individual humans who com y, from their conviction that it is convenient for its emotional appeal. The justification of the state of the demand for obedience, is the end pur- pose te activity. "Our rights are teleological." And socie ltitude of different groups among whom indi- vidu ces are divided. Sovereignty does not inhere in the the state is an association competing for alle- gian e individual like all other groups. Society is plur individualistic. It may be even anarchistic. Whe has achieved law and order, this is justifiable, becau riety, diverseness, will lead to progress.[10]

T, stimulated by Barker, denied the state as a unifi lity and state force as supreme sovereignty. Dug ition of the transformation of public law from com a sovereign to rules of organization then fol- lowe natural "next step."[11] Laski's translation of Dug *Transformations du droit public* into English, *Law Modern State*, gives additional elaboration of the dedi ich concur with a pluralistic conception in which the a single body of men.[12]

10 paragraph is a summary of the argument of Laski's first chap ereignty of the State" in his *Studies in the Problem of ove* w Haven: Yale University Press, 1917). Note how it paral article of 1914.

11 *Les Transformations du droit public* (Paris: A. Colin, 1913

12 the end of the translation in the *Harvard Law Review* of

In his second volume, *Authority in the Modern State*, Laski seeks the reason for obedience to government and the nature of freedom. Does freedom mean living the life which authority ordains, or "does freedom mean the recognition that there are certain reserves within the individual mind about which ultimate resistances must be organized?"[13] The individual is the real center of social importance; his happiness is the criterion for judging the state.[14] He must be free to make his judgments and decisions as he deems right.[15] His allegiance to the state must be secondary to his allegiance to society as a whole, and "the discovery of right is, on all fundamental questions, a search, upon which the separate members of the state must individually engage."[16]

In his *Foundations of Sovereignty*, Laski moves on from his attack on the unified state and its concentrated sovereignty to indicate some of the implications of a pluralistic state. It will substitute co-operation for a hierarchical structure. It will recognize and establish legally the federal structure which is actual in society.[17] It means not only a revision of the notion

1917 traces the extent of Duguit's influence and shows the extent to which Laski is in accord with it.

[13] He continues: "Has man, that is to say, rights against the state? If he belongs to a church where must his obedience go if there is a conflict of authority? Is he interstitial no less than social, and must we protect his denial of complete submergence in his fellowships?" (*Authority in the Modern State* [New Haven: Yale University Press, 1919], p. 120).

[14] *Ibid.*, pp. 120 ff.

[15] "The only means in which we can have confidence as a measure of progress is the logic of reason. We thus insist, on the contrary, that the mind of each man, in all the aspects conferred upon him by his character as a social and solitary being, pass judgment on the state; and we ask for his condemnation of its policy when he feels it in conflict with the right" (*ibid.*, p. 122).

[16] *Ibid.*

[17] This because: "The main advantages of this federal structure is that it affords better channels for the operation of an active consent upon the part of citizens than any other method" (*Foundations of Sovereignty* [New York: Harcourt, Brace & Co., 1921], Preface, p. vii).

of sovereignty but a revision of the notion of property and of liberty as well.[18] Laski expresses more strongly than ever before his sympathies with the average man as a member of various associations, and especially as a member of the economic system.[19] He defends the attempts to secure industrial democracy through nonpolitical efforts which disregard the state. He recognizes the force of the economic federalism which is growing in England and elsewhere as well. Trade-unions and associations throughout all industry are an increasing force which will eventually require recognition in what passes now for the sovereign parliament.[20] Sovereignty shall be partitioned upon some basis of function, and the worker shall find an active voice in his own governance. For in this way, and in this way only, can the personality of the worker get its fullest development, which is after all the main purpose of the state.

The war of 1914 proved the insufficiency of the capitalistic system under a sovereign parliament to satisfy human needs. It required the support of the workingmen and the co-

[18] "Liberty, in short, is incompatible with the present system of property for its result is a concentration of power which makes the political personality of the average citizen ineffective for any serious purpose" (*ibid.*, p. viii).

[19] "Here in reality is the seat of the modern democratic discontent. The liberty and equality implied in the modern state are purely theoretic in character. The industrial worker has the suffrage; but he is caught in the ramifications of a system which deprives its use of any fundamental meaning. He finds that he cannot secure from the operations of politics either that say in the determination of his life or in the opportunity to conquer the riches it can offer, that a democratic civilization is supposed to afford. He sees that democracy in politics does not in the least imply democracy in industry, and since the better portion of his life is spent in earning his daily bread, it is to the latter he has turned" (*ibid.*, p. 76).

[20] "If there is a necessary permanence about the sovereignty of the King in Parliament what, clearly, we must expect is a gradual replacement of a capitalistic state by a form of organization in which a vast series of government departments control modern industry as they now control the telephone and postal services. Parliament would represent producer not less than consumer. . . . " (*ibid.*, p. 82).

operation of the trade-unions.[21] It resulted in the formation of institutions which permitted co-operative action of employers and employees; in a federalism of control which ought to persist even after the war is over. For the state is merely on a par with other associations. All alike have reality; and all alike are to be judged by their purposes and functions—by their contributions to the individual.

This general outlook is restated, polished, and revised in Laski's comprehensive treatise *A Grammar of Politics*, where he presents it and its major implications for governmental structure and function. The democratic nature of government is still a fundamental concept; the consent of men is still vital, and reason is still essential to good government. The realization has, however, come home to Laski that the mass of men cannot find the time or the interest to concern themselves with politics. In all reality it is the function of the few. Individual reason is vital, but no longer sole, as a necessity in the ordering of social life.[22] Much of the activity in social life is nonrational, haphazard, due to chance occurrence. To a large extent this is true of activities of the state as well, in its striving for that social good[23] which justifies its existence. Nevertheless, only in the measure that its concrete applications and activities conform with the ideal purpose is the state's justification achievable. The nature of the state as a group of men in whom this purpose is personified makes them subject to this same criterion. There is no innate validity in their acts simply because they are identified with the state.[24]

[21] *Ibid.*, pp. 98 ff.

[22] "And even if each man could be relied upon to act consistently in terms of intelligence, there would be need for a customary standard by which the society in its organised form agreed to differentiate right and wrong" (*A Grammar of Politics* [New Haven: Yale University Press, 1925], p. 17).

[23] "It becomes an organization for enabling the mass of men to realize social good on the largest possible scale" (*ibid.*, p. 25).

[24] "Power is thus in itself morally neutral; what gives it colour is the performance it can demonstrate. Our ultimate allegiance is always to the

Validity comes from the individual judgments which individual men make about state demands and endeavors.[25] No special moral claims differentiate it from other associations in society. Its factual possession of the force in the community gives it no pre-eminence morally. There may be times when the use of force is not wrong, "when the common sense of society is on the side of the type of conduct it seeks to compel."[26] But the individual is the last reference on the question of whether or not he will submit to that force willingly, or disobey it and suffer the consequences. He has a moral right, nay, a moral obligation to make the choice. For the truly important thing is the fostering of individual personality and its development.[27] The truly important thing is the retention of the multitude of men as the judges of the actions of the few to whom have been intrusted political power and direction.[28]

The state must be responsible. It may not be feasible to divide political power, but it is feasible to insure popular control which is essential to democratic government, to permanent government. Three things appear necessary. The mass must retain adequate means of dismissing the state and of substituting another to replace it. The state must respect sources of organized consultation which should exist to advise it on matters demanding expert knowledge. The society must consist of citizens of substantially equal education and economic power; so that the mass may make its ultimate judgment not only intelligent but articulate.[29]

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ideal; and to the legal power that seeks to bind us our loyalty is conditioned by the purpose and substance we can discover in its effect" (*ibid.*, p. 27).

[25] *Ibid.*, p. 29.

[26] *Ibid.*, p. 33.

[27] *Ibid.*, pp. 36 ff.

[28] Democracy must be aristocracy by delegation; but the fact of delegation is vital (*ibid.*, p. 42).

[29] *Ibid.*, p. 74.

The necessity for these three things gives us an idea of the nature of the changes necessary in state structure and function. It means that the state organs, as we know them now, should be supplemented by organized boards with advisory powers to whom the agents of the state will turn for information and discussion of matters on which they intend to legislate. It means that the production and consumption of society will be under the control of units containing representatives of the employers, the employees, and the state. It means that "no man can run his business his own way"; for his business is not his own alone. It is of the public's interest too.[30] And all rights, including those of private property, are rights subject to duties—rights, in fact, deriving from duties rather than inhering in the individual as a human. And the concept of the state will be of an association rather than of a sovereignty.

Whatever is essential to the free development of personality, says Laski, is a right of the individual.[31] Therefore, rights may and do change from time to time and from place to place;[32] but, when necessary, they are rights whether the state recognizes them or not. If the state should fail to recognize them, the individual is justified in insisting upon them even to the extent of resistance.[33] For since the state is but one association among many in a federal society, rights—means for the free development of personality—may present themselves within any association or, perhaps, even outside of all associations.[34]

[30] *Ibid.*, p. 80.
[31] *Ibid.*, p. 91.
[32] *Ibid.*, p. 92.
[33] "My duty, therefore, to the state is above all my duty to the ideal the actual state must seek to serve There are then circumstances in which resistance to the state becomes an obligation, if claims to right are to be given validity" (*ibid.*, p. 96).
[34] *Ibid.*, p. 97.

The state functions primarily as a co-ordinating agency. It should respect the sphere of functions of other associations, so long as they are within their own limits.[35] To insure such respect, however, two things are necessary: an equal distribution of knowledge and an equal distribution of economic power.[36] With these two conditions existing, it is possible to safeguard the rights which are essential to individual and social well-being, rights born *with* the state not *of* it. For they precede law, which is but an attempt at their realization. They are, as we have said, derived from the needs of the individual, who is at the base of them all.[37]

The individual is entitled to the right to work and to adequate pay. He is entitled to industrial democracy as well as political, so that he may develop his personality to its utmost.[38] He is entitled to an adequate education and to actual political power, which includes not only the right to choose leaders but to be chosen as a leader, if he can, and the right of free speech no matter how unconventional his utterance may be from the point of view of orthodox political theory or from the point of view of military expediency. He is entitled to judicial safeguards and the rule of law which extends even to the highest offices. He is entitled to a functional right in property.[39]

The realization of these rights depends, in great part, upon the state.[40] On the other hand, because the state itself is an organization of humans, safeguards must be set up against it; conditions must be posited to insure its restriction to its legitimate activities. These involve practically, and Laski refers

[35] *Ibid.*, p. 98.
[36] *Ibid.*, pp. 98 ff.
[37] *Ibid.*, p. 105.
Ibid., p. 112.
[38] *Ibid.*, p. 130.
[39] *Ibid.*, p. 131.

to these time and again, a decentralized state, consultative bodies with whom the state must advise before it acts, and a recognition of the principle that the state must not interfere in the internal life of the associations.[41] For rights inhere in the unique individual; they inhere in the associations which express his partial interests; and they inhere in the community as a whole.[42]

Liberty is the opportunity to realize rights.[43] Political liberty[44] requires education and publicity; economic liberty requires a steady job and democracy in industry. The safeguards of liberty are: no special privileges; planned principles of social action, extending to the economic sphere; and unbiased state action.[45] Equality, too, is necessary as a safeguard of rights and liberty; it involves giving every man at least as much as he needs to be a man.[46] This, again, means economic equality as well as political; it means the destruction of industrial autocracy and industrial arbitrariness. It means that political democracy requires economic democracy too.

For the concept of property,[47] this has very definite implications. The unique individual, as the subject of rights, "has the right to control things in the degree that such control enables him to be his best self."[48] But he must compensate

[41] *Ibid.*, pp. 132 ff., esp. p. 139.

[42] *Ibid.*, p. 141.

[43] *Ibid.*, chap. iv, *passim*.

[44] "Freedoms are therefore opportunities which history has shown to be essential to the development of personality. And freedoms are inseparable from rights because otherwise their realization is hedged about with an uncertainty which destroys their quality" (*ibid.*, p. 144).

[45] *Ibid.*, pp. 149–52.

[46] "Equality, therefore, involves up to the margin of sufficiency, identity of response to primary needs. And that is what is meant by justice. We are rendering to each man his own by giving him what enables him to be a man" (*ibid.*, p. 160).

[47] *Ibid.*, chap. vi, *passim*.

[48] "He can claim, that is, such a share of the national dividend as permits him at least to satisfy those primary material wants, hunger, thirst, the

by personal effort and activity rather than by the fruits of ownership of property to which he contributes nothing. Inheritance of wealth is no right, except in few cases.[49] Property must result, in the main, from personal effort. It comes as a reward, which "enables the individual to reach out towards his best self, while simultaneously, it preserves and develops the necessary functions of society."[50]

Rights of ownership, from this point of view, are by no means arbitrary and absolute. The owner should get rent, not profits, from his capital. He should not be permitted to control the property or the industry he owns unless he is capable of actual management. "Just as the rules of a profession are made subject to the will of society, by those engaged therein, so must the rules of industry be made by the working force of industry."[51] Socialization ought to take place in industry. Essential commodities ought to be produced by the community for the community. Democratic control and publicity ought to persist throughout. The present right to property, where there is no function accompanying it, ought to be abolished, preferably by legislative enactment providing for the purchase of such property by the government.[52] It is more advantageous, Laski suggests, to buy than to confiscate, as the former method will generate less permanent antagonism in the dispossessed property class. But it must be recognized that the present economic system is breaking and the concept of property is changing.

In admitting, however, the necessity of working through

demand for shelter, which when unsatisfied, prevent the realization of personality" (*ibid.*, p. 183).

[49] "Inheritance is always justified where it means the provision of an income for widowhood, on the one hand, and the education of children on the other" (*ibid.*, p. 187).

[50] *Ibid.*, p. 195.

[51] *Ibid.*, p. 202.

[52] *Ibid.*, p. 208.

the state, of retaining political power as a unified whole in the hands of the state, Laski reveals a change in his own attitude which came as a result of historical occurrences in the third decade of the twentieth century. The attempt to spread governmental power to economic units in Germany through the National Economic Councils had failed. The political parliament had succeeded in retaining control in its own hands, and the scheme of the Weimar Constitution of 1919 (art. 165) failed to materialize. A similar fate overtook the guild socialism movement in England. Thus it comes that, in spite of the apparent logic of scattered power in a pluralistic universe, such as Laski himself advocated in his earlier works, the force of circumstances leads to the old conclusion that: "The territorial assembly built upon universal suffrage seems therefore the best method of making final decisions in the conflict of wills within the community."[1] The government will participate and control in industry; its supreme organ will remain the same. And the problem of controlling government will be resolved, not by an anarchic pluralism, but by an independent judiciary to insure administrative responsibility and state suability; by critical publicity and free discussion; and by "approximate economic equality," which is an extra-governmental practical sanction. All these the state should guarantee because of their essentialness to the continued free development of personality.

Laski's formulation in *A Grammar of Politics* reveals that the aim of his doctrine is no longer how to defend anarchy but how to avoid it. It seeks not to emphasize but rather to synthesize the pluralistic elements of society into a co-ordinated whole. In the suggested governmental organization this results in a reinstatement of parliament. Withal, surprisingly enough, the indictment against sovereignty still remains. Par-

[1] *Ibid*, p. 84.

liament may be "omni-competent," but it cannot be "sovereign." It may be the final authority in establishing and maintaining an equilibrium between forces and groups; it may be "magni-competent"; but it cannot be "sovereign."

Laski's attitude toward the theory of sovereignty has been constantly antagonistic. It has resulted in the association of his name in Anglo-American thought with the general attack on sovereignty. The significance of that attack in the light of the complete picture of socio-political relationships which Laski himself draws indicates, on the constructive side of the pluralistic picture, that the necessity for an ultimate co-ordinating body with finality of decision still remains. This finality must be invested in a unified body very similar in its composition to that already existent even in the days of Austin. The limitations upon it come rather from the sphere of ethical obligation and expediency than from any other force similar to itself. Constitutional limitations involve it; but they are of no more radical a nature than those which have surrounded it for a century. Laski's insistence that the theory of sovereignty is no longer valid is repeated in the *Grammar*. The historical developments of sovereignty as a means of achieving a unified state are reviewed; its past influence on the absolutistic character of the state is indicated; its connection with international independence and imperialism and war is traced. And the state in modern times is divested of all these characteristics. It is not unitary; it is not absolutistic; it is not independent. It is pluralistic, and constitutional, and responsible. It is limited, in the force it exercises; it is directive rather than dominating, in the decrees it issues; it is changing with every desire of the electorate, rather than permanent. Its power is diffuse, in territorial and functional groupings. Its will is subject to what we in America should call "lobbying" and "pressure groups." And internally as well as externally its activities

and functions are subject to limitations and review. Actually, the state is an association like other associations, with the special function of co-ordinating. It is a public-service corporation.[54] Since this is so, the doctrine of sovereignty, especially as it is developed by the lawyer, is politically worthless. It is not descriptive of the facts. There is no sovereign, no definite human superior, issuing commands with absolute finality which his subjects must obey. Law is not the subjective command of the sovereign. "It is a function of the whole social structure and not of some given aspect of it. Its power is determined by the degree to which it aids what that whole structure reports as its desires."[55] (He indicates his accord with Krabbe's conception here.) It is anterior to, or coincident with, the state, rather than of it. It binds the state to recognize international relationships as obligatory. An internally supreme, externally independent, sovereignty can have no justification. So runs Laski's arraignment of sovereignty.

On the other hand, that a co-ordinating final force is necessary is a belief from which Laski does not waver. An organ which will co-ordinate with finality finds its way back into his system. There is controversy only as to the nature of its construction. As to this, he takes issue with the earlier theory of G. D. H. Cole, which proposed a supreme court of functional equity consisting of the representatives of the various representative functional groupings of society. Laski rejects this plan to favor the retention of the traditional, territorial parliament as the final co-ordinating agency.[56] Individual participation will be limited to the right of selecting and dismissing the exercisers of the co-ordinating authority and of influencing that authority through associations.

Withal, however, society and authority are actually fed-

[54] *Ibid.*, p. 70.
[55] *Ibid.*, p. 287.
[56] *Ibid.*, p. 262.

eral. The formal unity of the co-ordinating authority should reflect as well as recognize this federalism and this diversity of interests and desires.[57] For its authority is only such as men please to ascribe to it.[58] Legality for law comes from the citizens of the state and hinges upon their acceptance. This means that they must be considered in the formulation of law in order to obtain as wide an acceptance as possible. The fact must be realized that their relationships are not unified; that their interests are not one; and that society is in reality not monistic. To unite all these pluralistic elements behind authority is a problem which cannot be solved by attempting to coerce them into a unity. For no such unity exists. And to attempt to make it would mean to sacrifice the diversities which are so fundamental to human personality. All that can be done is to federate all these various interests—individual, associational, and social—into a formal unity, into a scheme which recognizes and maintains these differences. Because of this federalism, then, sovereignty, with its monistic implications, must remain banished.

It becomes apparent from the seesawing of Laski's argument that his resolution of the problem of the individual and the state is not final. Guaranties of individual freedom and benefit from state supervision seem to be left still incompletely fixed. The state versus the individual is still an unsolved equation. The certainty with which Laski weighted it in favor of the individual in his earlier writings has yielded to a hesitancy which recognizes that authority is perhaps essential and inescapable, to a doubtfulness which results from persisting in the old point of view while conceding the new. It is indicative, however, of Laski's ability to grow and his sensitiveness to social change, albeit that involves, consciously or

[57] *Ibid.*, pp. 270 and 279.
[58] *Ibid.*, p. 248.

not, some shift in doctrinal position. This ability to absorb and respond to social change reveals itself in the far-flung eclecticism which we meet in Laski's general philosophic outlook.

There can be no mistaking the influence of Ernest Barker and Léon Duguit on Laski's political philosophy. The foregoing discussion indicates to what extent—it might even be more accurate to say, how completely—he adopted the arguments of Barker's "The Discredited State" as the starting point of his crusade against the theory of sovereignty. It reveals the influence of the attitude of Léon Duguit toward the state in the Laskian arguments against state sovereignty. Later, Laski found confirmation for his developing attitudes in the works of Krabbe and still more recently in the writings of Hans Kelsen. His general philosophic approach seems to be that of William James and John Dewey. His psychology would appear to be that of William McDougall; his sociology that of Graham Wallas' *Great Society*. His legal philosophy reveals the influences of the great American jurists like Holmes, Brandeis, and Frankfurter.

One should note that the old motives of individualism, democracy, the development of personality, liberty, equality, and morality play significant roles in his political philosophy. If he advocates change, it is in order to further these rather than to negate them. Individualism can best be furthered by an extension of democracy to the economic sphere. Liberty and equality revolve about the possibilities of furthering the development of personality. Morality is the basis of judgment of all activity, be it state or individual. The conscience of the human individual, on a plane of equality economically and intellectually, should decide freely whether or not the activities of the state, by which he means the government, further the development of human personalities, which is the focal point of Laski's thought.

Fundamentally, Laski is a rationalist, a believer in the efficacy of reason and intelligence in the control of human affairs.[59] Just as definitely, he is a democrat, a believer in democratic government.[60] He is, basically, an individualist, a believer in the uniqueness of each individual, in a uniqueness which ought to be safeguarded from, and respected by, the state. He is also a pragmatist, seeking to judge things by their consequences, and a pluralist, viewing society not as a monistic whole but as composed of many component parts, individuals, and groups.

To none of these beliefs, however, do we find Laski unqualifiedly maintaining a blind devotion. If he places reason high in the realm of human social life, he recognizes as well the limitations of that reason.[61] If democracy is a final form of government, democracy nevertheless extends only to the ultimate control of power, not to the actual problem of administration. For the actual control of power is the responsibility of experts rather than of the masses of men. Similarly, although Laski is an individualist, he recognizes very definitely the place of society and co-operative action, even of coercive action.[62] This recognition of coercive or co-operative action as an eventuality leads to the recognition in his *Grammar* of the inadmissibility of anarchy as a deduction from pluralism. Some form of final reference for the maintenance of an equilibrium there must be, and, as we have seen, actually it appears as the territorial parliament with consultative cobodies. And even in the pragmatism which would judge everything by its consequences, we find that Laski does not drink the whole cup. The ultimate criterion of judgment, the

[59] *Ibid.*, p. 16.
[60] *Ibid.*, p. 17.
[61] *Ibid.*, p. 34.
[62] *Ibid.*, p. 17. And again: "At some point spontaneity ceases to be practical, and the enforced acceptance of a common way of action becomes the necessary condition of a corporate civilization" (*ibid.*, p. 18).

criterion for which his theory argues, is itself another: it is the human conscience, the moral sense, rather than reason deducing from experiences. And in some cases even conscience seems to be subordinated to an "organised social life," which appears as a higher value.[68] This is far removed from the philosophy of the earlier Laski who did not quail at contingent anarchy. But it is in line with the general shift of Laski toward a conservatism which results from an increasing emphasis upon the social aspects of life, and it reflects what has become a dominant motive of the modern period.

[68] *Ibid.*, p. 33

CHAPTER IX

SUMMARY AND CONCLUSIONS

THE PRECEDING pages have reviewed the main patterns of the concept of sovereignty as it is revealed in the latter part of the nineteenth century and the early part of the twentieth. In presenting the formulations of outstanding jurists and political scientists, the attempt was made to indicate the various aspects of sovereignty about which discussion has centered in the period under review. The individuals were chosen as representative of definite patterns of the theory current until this very day. In some cases there was necessarily something arbitrary about the choice; the selections are, however, sufficiently typical of the actual patterns to indicate the vital questions which are the real concern of this study.

The problem posited at the outset was what happens to the theories of sovereignty as they course through the decades of the late nineteenth and early twentieth centuries? The patterns which appeared at the threshold of the period under study fell generally into four categories: (*a*) sovereignty (supreme power) resides in the one; (*b*) sovereignty resides in the many; (*c*) sovereignty resides in the supermundane or the superhuman; (*d*) sovereignty is fragmentary. What happens to these patterns as they meet with the changing conditions of the recent past? What happens to these patterns when social and economic and intellectual forces undergo an apparently continuing transformation? What has changed and what has remained constant? What is basic and what is transient? And, if we can answer this with any degree of accuracy, what are the future possibilities of the theory of sovereignty?

There is no intention of reiterating here what was said in

the preceding discussions concerning the formal elaborations. Let us ask ourselves, however: What were the problems with which they dealt? What were the issues involved in their formulations? What stimulated interest in the various and sundry aspects and implications of sovereignty?

Basic to all these theories lies the age-old problem of the relation of man to society. How should man conduct himself in relation to the social environment which surrounds him? The question, thus stated, is essentially one of ethics. When we ask, however: how should society, how should the social environment, conduct itself in relation to man whom it encompasses? then we have the problem of sovereignty revealed. The problem of sovereignty is essentially and vitally that of how much control has society over the individual man? To what extent is he subordinated to external social compulsion? To what extent is he free from any such compulsion? Under what circumstances does his will become subordinated to that of the social will conflicting with his? Under what circumstances has he the right to resist that will?

These questions involve others. What is it that gives the social will the capacity to influence his actions and conduct? What justifies its assumption of superiority? is it origin or purpose or nature? Is the justification of the superiority of society—another way of saying the sovereignty of society—within or without the individual?

And how shall that superiority be exercised? Is there a definite procedure which entitles the social will to dominate or no? Is there a limit to the extent of that will or not? If there is, what are the boundary lines and how are they determined? If there is not, how shall the individual react when he feels that he cannot tolerate the imposition of the will incompatible with his own?

And then there is a whole series of questions relative to

the problem of sovereignty, not from the point of view of the individual who is its object, but from the point of view of the individual who has its exercise in his trust. Granted that sovereignty is the possession of the one and that his power is absolute, there are still the questions of how to use it and toward the furtherance of what ends and in the achievements of what purposes. In modern times, when confessedly in all the theories sovereignty is not the possession of any single individual and is not absolute with him, the problems of the exerciser of sovereignty become even more complicated. The problem becomes one of determining ends, purposes, and means, of arriving at agreement among the plural copossessors of power, of what should be done when acquiescence is impossible. Should the minority be overridden or not? Should majority rule in all cases or only in some? If the latter, in which?

Should there be rules providing for the cases where the majority ought to be checked or might be checked? And should these rules be flexible or not? What should society do with resisting individuals in time of danger or emergency? These problems are of tremendous importance to the possessors of sovereignty. Their resolution one way or another means much for the individual who may happen to be the object of sovereignty and whose fate depends upon the nature of the decision.

The definition of sovereignty given, for instance, by the school of national sovereignty is not merely the work of a lawyer concerned with affairs of government procedure. It is a philosophy of social life, involving the relations of the officials in the governmental hierarchy and their relations to the millions of individuals. It is an attempt to make definite the nature of those relationships.

When the legal formula is enunciated that "sovereignty re-

sides in the nation and can reside only there," it has a meaning and significance which reaches into and through almost all the relations of man and his government. If sovereignty resides in the nation, then the actual person at the seat of administration is only a delegate, a representative, of the whole, not its master. Then the nation as a whole must be consulted before any exercise of its power is permissible. Then the relation of the individual to government is only indirectly with the sovereign; and machinery must be set up to make clear the will of the sovereign before any administration may enforce its commands to any subject. The personnel of government must be at least the tacit choice of the nation; the policy of the government must be one which the nation desires. It must be clear that the means of executing the policy are in accord with the sovereign's will. The individual has the right to insist on all these. He may question whether or not the person directing him is truly a representative of the nation, properly chosen and accredited. He may question whether or not the policy pursued is the policy designated by the nation or its agencies. He has the right as individual to challenge the governmental activities in the courts; to determine whether or not they are in accord with the previously expressed will of the sovereign nation. And he has his rights because sovereignty does not reside in the government but in the nation.

As against the nation itself, however, the individual stands in a less advantageous position. As against the nation itself, once its will is expressed and determined and certified, the formula recognizes no appeal, for there is no appeal against the supreme power. Resistance against the government there may be—active, defensive, or passive. But against the nation there is no such possibility. Resistance against the constitutionally formulated, legal dictates of the nation can find no legal justification. From the point of view of the state and its

jurists, no other way is possible. The state cannot permit itself to be frustrated. Minorities, recalcitrant individuals, cannot obstruct sovereign power, once it expresses itself through legally recognized channels. What limitation there is on the sovereign power, be it the nation or society, is one of extra-legal considerations—expediency, morality, economy—but there is no legally recognized source within the state to which the individual can appeal successfully against the state. There is an "appeal to Heaven," but it is not lawful.

Obviously, this ultimate decision in favor of society against the individual is the natural one from a defender of the order as is. The existing government, working within its sphere should, he reasons, brook no obstacles toward the achievement of the purposes it sets itself. And a defender of that government, fully reconciled to its adequacy, cannot fail to "view with alarm" any tendency to attack its fundamental bases. Any attempt, therefore, to challenge the principle of the supremacy of the nation must be considered unjustifiable. Such a challenge is illegal, paradoxically enough, even when legally suggested. For a *state* cannot commit or permit suicide; since the act has consequences for the *nation*. The nation, the theory runs, is composed not only of the past and present generations but of the future generations. From these the present can never steal their birthright—the inalienable right to the exercise, in their turn, of the national sovereignty.

The logic of this reasoning, challengeable perhaps if one were to analyze it closely, if one were to engage in dialectics, is an effective defense of a vital point in the dogma ideologically basic to a very definite form of political organization. But it must be pointed out that its effectiveness rests on the fact that its logic is not challenged, that its arguments are not analyzed and their weaknesses revealed. Suppose one were to question: Why cannot a nation alienate its sovereignty

and withdraw from the constitutional forms which characterize the modern democratic representative state? Why cannot this alienation itself be an expression of national sovereignty? Is it not itself a limitation on national sovereignty to limit it to one definite constitutional form or set of forms? Cannot the supreme power express itself through one structure as well as another? And can we not have, even with the recognition of this fact, a constitutionalism, a liberalism, a respect for the individual and for minorities fully as great as that which the theory of national sovereignty actually achieves?

In the theory of auto-limitation, such a recognition becomes the center of the formulation. The nation, which this theory calls the "state" or "society," has as its essential power the capacity to change itself. It, too, must act within legal limits; it, too, must move in accordance with the desires of a majority, but it can change its constitution, if and when and how it pleases, provided the change is made according to the rules prevailing at the time. In our detailed analyses of the theories of Esmein and Jellinek we have seen how closely alike they were; how both sought the same ends—constitutionalism and individualism—and utilized similar tools—logic and history. Their formulations differed, however, on this pivotal point because of certain peculiarities of the authors. Esmein used history just so long as it suited his purpose. Ancient history did not concern him at all when he came to formulate his theory—and this in spite of the fact that he knew ancient history. Nor did all of modern history come within his ken. Neither Germany nor Russia received any attention from him when he was building his proofs for the validity of his theory of national sovereignty. And the reason is fairly patent. He had his task given. His problem was to find new bases which would support propositions long adopted by the French

Revolution and underlying the practices of the existent French state.

Now in Jellinek, for one thing, the problem was not the same; the task was different. Throughout his major works there is visible a catholic interest in political organizations of all history, ancient as well as modern, non-German as well as German, nondemocratic as well as democratic. His task was therefore to discover a formula for sovereignty which would fit ancient and modern, monarchical as well as republican states, and at the same time would satisfy the peculiar demands of his immediate constitutional system—the German, itself in the process of unification, in the throes of the problem of federalism. He found his formula by emphasizing the element of change which Esmein had sought to decry. History shows change; governments show change. To Jellinek these changes are teleological—the conscious desire of the society or state or nation. The German states had consciously changed into a confederation, into a Reich; France had consciously changed from a monarchy into a republic. And thus any and all sovereign states could do. For the ability to consummate change freely is the essence of sovereignty.

Jellinek comes to this conclusion partly because he was concerned with a rationalization of political phenomena in a larger domain than his contemporary and because he sought a synthesis applicable to much more of history. At the same time he preserved the term which was traditional in both political science and political jurisprudence, but which, under modern conditions, could no longer be justified in its older meaning of supreme, absolute, inalienable power. In modern democracies there was no such thing. In modern democracies power was limited by legality, by constitutionalism. Even logically, absolute, unlimited power is impossible. For power must, by its very nature, limit itself. If it chooses to act in

any given way, it of necessity limits itself to that way of acting, at least for the time being; it cannot act any other way; it cannot act two ways at once.

This argument was Jellinek's rationalization of constitutionalism. It was, like Esmein's argument about the inalienability of national sovereignty, an attempt to justify the legal bounds which a definitely accepted constitution threw about the power-holders. It was an attempt to make more secure the safeguards of individual rights unless and until they were rescinded by legal means. And unchallenged it, like Esmein's, is good propaganda, good justification for the *status quo*—for the situation as it existed, for instance, in the German Reich when Jellinek wrote. But even Jellinek's logic is challengeable. Jellinek had sought to develop his jurisprudence in a logical, comprehensive, system. And he worked with the tools in hand, with—to state it differently—the terminology and concepts of a jurisprudence already current. Since sovereignty was part and parcel of the current jurisprudence, he utilized it, adapted it to his situation, and rested content. To this extent, he worked—as Preuss says so cogently of the whole line of jurists following von Gerber, Laband, and even Gierke—"from the top down." He assumed the concept and then proceeded to build toward it. Inherent in the concept was, however, an assumption of monism, of unity in power, which certainly did not exist in reality. There was a simplification of the power of the state in the view which saw it as a unity. In social reality this was not so. And Jellinek knew this as well as anyone, from his familiarity with sociology. What Jellinek did, however, was to fence off the field of jurisprudence from sociology, to justify that isolation as due to the inability of man to integrate the sciences or study all aspects of one object at once, and then to retain the concept of a single state power as a valid tool within the limits of jurisprudence.

Assuming the unity of state power, the rest of his construction is logical enough. But suppose one were to challenge this fundamental assumption of unified commanding state power. Then the logical construction would fall; the underlying ends, constitutionalism and individualism, not necessarily. As evidence of this appears the formulation of Duguit in France.

The preceding analysis of the relations of Duguit and Jellinek has already revealed the essential similarity between the two. Constitutionalism and individualism are basic in both. But Jellinek, a Kantian in philosophy and in jurisprudence, following the doctrine of domination, differs from Duguit, a disciple of Comte and a legalist subscribing to the doctrine of social solidarity. Duguit could not accept the fictitious monism implicit in the older concept of sovereignty; the very concept had been the subject of devasting criticism in Comte's philosophy. It was the typical example of the second stage of knowledge in the field of the political; it was metaphysics, pure and simple. It simply cluttered up jurisprudence and hindered it from envisaging or expressing reality. The same is true of its sister-concept, the state person. This too is a fiction. It too must go.

But, and we reiterate this again for emphasis, with it goes neither constitutionalism nor individualism. Constitutionalism, in fact, comes back even more strongly and with a greater dominance; it comes back under the protection of the fundamental basis of the natural law of social solidarity, which is rigid and inflexible in formula and ever changing in content: Do everything possible to further social solidarity and nothing to hinder it. This applies to the governing personnel as well as to the governed. It limits the state and the individual in the same breath, but it also makes them both guardians of social solidarity simultaneously. It subordinates the individual completely to the needs of society and its solidarity;

but it subjects the governors to the same superior—to a supramundane "sovereign," to a law. And in this way it safeguards the individual as essentially as it can; as securely (perhaps, as insecurely were it a better way of phrasing it) as does the theory of Esmein or of Jellinek.

In truth, Duguit combines sociology and jurisprudence with a mysticism all his own. Whence comes the justification for the doctrine of social solidarity as a base for jurisprudence? Actually the concept of social solidarity was developed by Durkheim, as a contribution to sociology. But to adopt it as the foundation of a jurisprudence is to subject that jurisprudence to its inherent weaknesses. The accuracy of the assumption that all mankind, all society, does and therefore should work toward social integration is questionable in fact as well as unconvincing in logic. The process of disintegration is as apparent in social life as is that of integration; and even were it not as evident, by what logic does "what should" follow from "what is"? How is the transfer made from the realm of the real to the realm of the ethical? Or, if we were to talk once again in the language of Kelsen, how can we cross from the *Sein* to the *Sollen*? Therefore, there seems to be truth in those of Duguit's antagonists who declare that he has returned to a system of "natural law." In a certain sense, he has.

This much he has very definitely done: He has reverted to the sovereignty pattern which we have designed as superhuman. Supreme authority or power or control, whichever term be used, no longer exists in either the individual or society or the state; it exists in the scientific nature of things. It is a rule, a law to which we must be subservient, or else its consequences will coerce us to conform. And he assumes it as a reality upon which he bases his jurisprudence.

Here, again, suppose one objects to this procedure; suppose one decries the creation of a rule of social solidarity or the

hypostatization of society? The illogic can be avoided, and the supremacy of law and the safeguards of individual personality and democracy still remain. It remained for a pupil of Jellinek to pick up the thread of his master and, objecting to the assumed unity of the state and sovereignty, develop a more logical theory divorced from the meta-juristic, meta-realistic elements of both Jellinek and Duguit.

The actual formulation of Kelsen has been discussed at length in the chapter devoted to his theory. What is interesting to us is that, in this latest development of jurisprudence, the supremacy of law is juristically exalted to the skies; it is sovereign; but it is based on the individual and on his feeling of obedience—the same base as Jellinek uses and Laski (and Krabbe). Again the individual comes back into his own: juridically, sovereignty pertains to the legal order; it is supreme, all-highest; but really basic is the individual human, the source of the sense of obligation, of the "I should obey," upon which legal order is founded. In the realm of the *Sollen,* in the sphere of jurisprudence, the nature of the constitutional form of any organized government is not definitely determined. Jellinek had pointed out that any given society might determine or change its constitutional form; but the arguments in favor of democracy are that it is still the safest form of government because it operates on the broadest base and because it gives the widest sphere from which to choose leaders. And Jellinek's pupil feels that these are sufficient justification for the democracy he desires.

Apparently twentieth-century theory still has not gone beyond these ends of government; democracy, constitutionalism, and individualism persist throughout all the formulations, like the purple thread in the Hebrew fringes. But the twentieth century has begun to show signs that even these may be the subject of the next attack. For the attack of logic seems to

follow the basic social and economic and political facts in the environment. Where these differ, formulations follow suit. Changes in the underlying social and political facts serve to reveal the flaws in the basic assumptions of the various patterns analyzed. And we may speculate as to the meaning of the signs.

When the theory of national sovereignty in the formulation of Esmein appeared, the forces of representative democracy were definitely in the ascendancy; perhaps almost sole in his horizon. The same is essentially true of Jellinek. There was no gainsaying the "triumphant march of democracy through modern history." And essential to its whole philosophy had been the idea that the state, representing the nation, was sufficiently capable of protecting the individual in all those relationships where he needed protection. Partly because of this feeling, partly because of the historical conditions from which democratic governments arose in the late eighteenth century, partly because of the state's jealousy for the total allegiance of its citizens, this feeling was incorporated in the lawbooks in the negative commandment against the formation of societies and associations within the state. The individual could and should find his complete protection in the state, since the state was his, and its primary and sole purpose was his protection. Therefore, any attempts by citizens to form combinations within society for the purpose of protecting themselves from too powerful employers, let us say, were frowned upon. Statutes were passed making associations among workingmen illegal. Associations needed special government licensing if they desired legal recognition—all because they were considered as competition in the primary function of the state, the protection of its individuals.

This philosophy which saw the national state as the sole protector of the individual was good as an attack against the

ancien régime and the monopolistic guilds of feudal times; it ran counter, however, to the tendencies which inevitably came to the forefront with the increasing growth of the Industrial Revolution and the concomitant rise of trade-unions and associations. It ran counter to the specialization of group interests which followed inevitably on the specialization of functions in industry and commerce. It ran counter to the ever crystallizing smaller groups within the body politic. As a philosophy it was becoming less and less appropriate with the increasing formation of unions and syndicates. The governments themselves were responding to the call to legalize these formations. England revoked its law against unions as early as 1875; France passed its law concerning *syndicats* in 1884, and concerning associations in 1901. With the growth of syndicates the philosophy which had been used to oppose their formation was challenged. If "sovereignty resides in the nation" meant, as originally claimed, that all power resided solely and exclusively in its juridical personification—the state, then for the syndicalists there could be no sovereignty, unless—and this alternative too appeared—the syndicates were recognized as copartners with the state in the exercise of the national power; unless, that is, representation of interests was permitted along with the customary territorial representation which presumably reflected the people.

Now it was primarily for these syndicates that Duguit's formulation had very special value. He formulated a rational defense for them. He emphasized their importance and their right to participation in the affairs of state. He served to demolish the older defense, to tear down the older symbolism to which their loyalties had been attached. And he presented a new shibboleth to which they could turn without losing caste. He presented a rationalized jurisprudence to which the logical French mentality could appeal for justifica-

tion when, as happened actually, persons with socialistic and syndicalistic sympathies joined the government and had to reconcile their position as defenders of the state with their previously avowed sympathies. To them Duguit was a godsend.

His point of view and philosophy were adapted in other countries where it served a similar function. It was popularized in England, among others, by Laski, whose relation to Duguit has already been discussed. It was recognized in the United States, in books, textbooks, and articles. On the continent of Europe, too, it made its influence felt wherever the syndicalist movement could invoke it. And in Duguit, it was the second alternative he sought—the recognition of syndicates in government and the representation of interests. His philosophy was an effective weapon of attack against the state. It could be utilized, however by antidemocratic forces as well as by democratic; by anarchists as well as by believers in the need of the coercive sanction in government. And it was so utilized; albeit Duguit himself did not go so far. He denied any tendency toward anarchy or any antidemocratic tendencies; it was in the name of more democratic and better government that he militated.

Nevertheless, the germs of different possibilities lay in his formulation. For one thing, his thesis set up the supremacy of social action. It posited as a scientific law that any violation of the rule of social solidarity would be followed by a social reaction which would tend to re-establish the rule and punish the violator. It set up, as one of the main functions of the state, the maintenance as well as the fulfilment of the public services. And all these things may be manipulated to negate both democracy and individualism. For if we set social action up above the individual in all cases, if social solidarity is superior to the development of individual personality, then individual personality must and will be sacrificed when the prob-

ability of social disintegration becomes imminent, especially, in a theory like Duguit's, where there is no attempt to set the individual up as the substance or base for which social solidarity is desired. Social solidarity is primary, and desires of the individual, in the prosecution of this end of the government, but a secondary consideration. It might become necessary to withdraw all the individual's so-called "rights" because of the changed social necessity which makes his duties different and therefore his rights other. And, withal, the philosophy of Duguit, antistatist though it declares itself in general, may lead to the most complete absolutism; may find itself in accord with the absolutism of the Hegelian state and the antidemocracy of fascism.

This theory, which was so opposed to the theory of sovereignty and of supreme state power; this theory, which sought to put the state on a par with the other public services in society and which sought to set the individual and the associations as well as the state as guardians of social solidarity, found itself pointed to a system of government even more dominating than the system of German monarchy or French *étatism* against which it rebelled. It found its apotheosis in the fascism of Mussolini's Italy where, in the interests of society, liberal individualism was crushed and the public services became state-controlled in order the better to preserve them.[1] There is no indication as yet (so far as this author knows) that the Italians have developed a juridical system peculiar to themselves.[2] It would seem that they have found

[1] Cf. W. Y. Elliott, *The Pragmatic Revolt in Politics* (New York: Macmillan Co., 1928), pp. 250 ff., where he discusses the relation of Duguit to the corporative state: "Ultimately, it [Duguit's formulation] results in an apology for the Fascist ideal of a disciplined national organism."

[2] "La soi-disant doctrine fasciste de l'état—telle qu'elle fut ébauchée par l'emploi de la méthode indefinissable dont nous venons de parler et sur l'imitation de modèles si disparates—n'a eu encore aucun développement juridique.

"Les juristes italiens ne se sont encore pas encore ressaisis de l'ahuris-

themselves able to adapt their situation to the juristic formulations current in the present century—formulations emphasizing, as does Duguit, the essential primacy of society or nation. They emphasize the complete ascendency of society over the individual.[8]

Fascism could easily justify its absolutistic and antiliberal tendencies in the elaborations of the theory of auto-limitation so soon as it could assume the congruence of the Fascist party with the state, and of the state with the nation. It could then appeal to any but one of the formulations reviewed in the preceding chapters. The only exception to this general statement is the theory of national sovereignty as propounded by Esmein. For him, the very institutions of the older democratic forms are holy and necessary connections with the dogma of sovereignty. Therefore, the destruction of the machinery for representative government is incompatible with his theory and unjustifiable. Apart from Esmein, the systematic elaborations of the other jurists whom we have viewed could be reconciled with the practical developments of Italian nationalism. This does not mean that the authors we have viewed would subscribe to the resultant Italian fascist jurisprudence; it simply means that an adaptation of these elaborations might be made to fit the Italian scene. The same thing is essentially true of the communistic system. It, too, can make its accommodations to almost any of the theories which serve as a justification of state power; but it, too, must seek a theory which does not attach too much importance to the

sement profond où ils furent soudainement plongés par l'injonction qui leuf fut addressée de conformer leurs enseignements aux service de celui-ci—par le reniement et la critique impitoyable de leur propres convictions traditionnelles—un système capable de le justifier vis-à-vis du droit" (Silvio Trentin, *Les Transformations récentes du droit public italien* [Paris: Libraire Générale de Droit, 20 rue Soufflot, 1929], p. 506.

[8] Rocco, "La Crise de l'état en Italie: la solution fasciste," *Revue des vivants*, July, 1927, pp. 934 ff.

older forms of democratic government. Apart from that, so soon as the Communist party can establish its identity with the state, it too can make a facile adjustment to the theory of auto-limitation, social solidarity, or "pure jurisprudence." Which theory will be written into the Soviet jurisprudence is still too early to state. What is interesting, from the point of view of the future of the theories themselves, is the fact that the shift toward a communistic state does not serve to threaten the bases of the twentieth-century formulations.

For what is basic to the formulations of sovereignty apparently has not changed; the existence of authority and the need for its justification still continue. The primacy of organized society as against the individual still obtains. Social organization, social control, and social direction—these things are still basic and apparently permanent. What are changing are the forms of social organization, the means of control, the methods of direction. These are transitory and in the midst of change. And even here, as we look at these in a larger perspective, we find that the forms which seem to emerge are not completely new. There seems to be a recurrence of older patterns and a re-emergence of older types. Dictatorships present nothing novel in the history of political science. Nor is the dominance of a single group of individuals claiming to be the élite strange to the political theorists who recognizes the essential similarity between the words "élite" and "aristocracy." The recurrence of political patterns so definitely similar to those of many in the past suggests the possibility of a concurrent revival of the theories which served to justify those patterns previously.

In the situation of the theory of sovereignty in the British Empire, we see such a recurrence. There, once again, the old problem of federalism has recurred in the twentieth century. In the nineteenth, the problem of federalism was a practical

issue in the United States and in Germany. In the latter country it received substantial juridical treatment; there, too, the question of how sovereignty must be considered arose to plague the jurists and to confound the statesmen. There, too, some said: Forget the concept; it is outworn. Some said: The old concept is still adequate; sovereignty resides in the empire. Others said: No, in the members. Still others, who sought a compromise, suggested divided sovereignty. And this same experience is repeating itself with respect to the British Empire. Here, too, some say: Let us not bother with a nineteenth-century concept. Others would still see it in the British Parliament; others, in each of the dominions; and others, like the international lawyer Dr. Quincy Wright, recognize the traditional situation of divided sovereignty.

In spite of the sense of the persistence of the old, in spite of the feeling that juristically there is nothing revolutionary in store for the theory of sovereignty in the immediate future, any prophecy as to the future of the concept must take certain other things into consideration beside those of the economic and social and political forces which have been its sustaining support. These are the scientific and ideological tendencies of the twentieth century. The various theories already presented have indicated the tremendous influence of the general ideology of the author upon their structure and form. The influence of Montesquieu and Rousseau and of the school of reason on Esmein; the influence of Auguste Comte and Emile Durkheim and sociology on Léon Duguit; the influence of Gerber and Laband and Kant on Jellinek; the influence of Jellinek and Kant on Kelsen—all of these have already received detailed attention. But the point is that these various expounders of ideologies have had great significance for the subsequent theories of sovereignty which resulted. They explain the insistence of Esmein on the representation

of the nation and on the separation of powers; they explain the rejection of the theory of sovereignty and the attempt to build a new jurisprudence, real and objective, by Duguit. They explain the retention of the idea of domination in the concept of state force and the acceptance of the ethical idea of self-limitation in Jellinek's jurisprudence. They explain the division of the world into *Sein* and *Sollen* and the insistence upon a pure jurisprudence with a separate methodology and content in Kelsen.

So, if one were to consider the subsequent career of the concept "sovereignty," one needs must take into account the ideological tendencies, the general currents of *Weltanschauungen*, and the direction of the sciences, natural as well as social. Only when this is given along with the social and political facts can we venture with any surety to prophesy concerning the future of the theory of sovereignty.

Attempting to penetrate the darkness of the future one is baffled here by two apparently contradictory tendencies. The isolation of the sciences, which Jellinek had justified because of the intricacies of the social and natural sciences, is stressed even more strongly in the pure jurisprudence of Kelsen. Isolation makes for conservation. So long as the fields of the various sciences are separated, change will be gradual, if at all, and the tools and concepts of each science will remain, so long as they have validity, in their immediate spheres of reference, limited though these be. This means that the theory of sovereignty will persist as a term defining power or the status of that power, or as a term defining a legal order or the status of parts within that order or the totality of that order. This seems to be one tendency.

On the other hand, the isolation of the sciences is being broken down. In Duguit the attempt is made to amalgamate jurisprudence and sociology. In the attempt, even in jurispru-

dence, the concept loses its very life. In the political science of Harold J. Laski, we find that the very term is rejected in the eclectic formulation of *A Grammar of Politics* which attempts a synthesis of political science, sociology, history, and economics.

There are indications that both tendencies will persist; that there is strength in the attempts to integrate knowledge, on the one hand, and in the necessity to subdivide knowledge in the process of analysis, on the other. How the sciences with which the life of the concept "sovereignty" is most intimately bound up will fare is still too difficult to forecast. This seems certain, however: The need for social organization and social direction remains undiminished. The problem of the relation of the individual to that organization and direction recurs and demands settlement whenever a change in direction or organization is intended. With that need and that problem come definite patterns of thought which find verbal expression. The theories of "sovereignty" may disappear with changes in terminology; but the substance of sovereignty will remain so long as the problems of social control divide men into rulers and ruled, into leaders and led.

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